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THE  
**ONTARIO REPORTS.**  
VOLUME XXXII.

CONTAINING  
REPORTS OF CASES DECIDED  
IN THE

**HIGH COURT OF JUSTICE FOR ONTARIO**

WITH A TABLE OF THE NAMES OF CASES ARGUED,  
A TABLE OF THE NAMES OF CASES CITED,  
AND A DIGEST OF THE PRINCIPAL MATTERS.

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DURING THE PERIOD OF THESE REPORTS.

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#### ERRATA.

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- Page 156, line 7 from top, for "Chesley" read "Chorley."  
Page 188, line 13 from bottom, add "Rose and MacMahon, JJ."  
Page 216, head-note, line 7, for "plaintiff" read "defendants."  
Page 227, line 17 from top, for "29 O.R. 104" read "29 S.C.R. 104."  
Page 255, head lines, for "sub-secs. 8, 448" read "sub-sec. 8, sec. 448."  
Page 358, head-note, line 4, for "assessor" read "collector."  
Page 376, head-note, for "14 O.R. 318" read "14 O.R. 358."  
Page 387, 2nd line of head lines, for "Cause—By-law—Time for Payment of" read "Calls—Time for Payment of—By-law."  
Page 418, 4th line of head-note, for "and in which" read "as against which."

# REPORTS OF CASES

DECIDED IN THE

## HIGH COURT OF JUSTICE FOR ONTARIO.

[DIVISIONAL COURT.]

RE LUCAS, TANNER & Co.

*Bankruptcy and Insolvency—Assignment for Creditors—Examination of Assignor — Unsatisfactory Answers — Concealment — Committal — R.S.O. (1897), ch. 147, sec. 36—58 Vict. ch. 23 (O).*

The provisions of sec. 36 of R.S.O. (1897), ch. 147, which provide for the punishment of an assignor, who has concealed or made away with his property in order to defeat or defraud his creditors, do not apply to his acts disclosed on examination as having been done before the date of the passing of the original Act, 58 Vict. ch. 23 (O). Judgment of FALCONBRIDGE, J., reversed.

THIS was an appeal from a judgment of FALCONBRIDGE, J., ordering the committal of one Charles E. Tanner, who had made an assignment for the benefit of his creditors, on the ground that he had refused to disclose his property, and his transactions respecting the same, and had not made satisfactory answers on his examination under R.S.O. ch. 147, sec. 36.

Statement.

The motion was argued in Chambers on January 13th, 1900.

*J. H. Moss*, for the assignee, in support of the motion.  
*John A. Ferguson*, for C. E. Tanner.

January 13, 1900. FALCONBRIDGE, J.:—

I find on perusal of the two examinations and the exhibits therein referred to, that the said defendant has



Judgment. refused to disclose his property and his transactions respecting the same, and has not made satisfactory answers respecting the same, and that it appears from the said examinations and exhibits that he has concealed and made away with property of the insolvent firm in order to defeat or to defraud creditors of the said firm. I so find, especially as to charge 1.

Falconbridge, J.

He has not satisfactorily accounted with his dealings in respect of the \$2,000.00: also, as to charge 2, cash and I.O.U's: also, as to item 7, with respect to improper disposition of assets and reckless dealing with funds entrusted to him or his firm, by way of deposit or otherwise.

I have not gone so fully into other charges but the answers were not satisfactory.

The insolvent is said to be a man advanced in years and rather unversed in the ways of business than dishonest of intention. That may well be, but the result is equally unfortunate for creditors and the community in general.

I must order that the insolvent, Charles E. Tanner, be committed to the common jail of the County of Lambton, for the term of two months.

From this judgment C. E. Tanner appealed, and the appeal was argued on the 26th February, 1900, before a Divisional Court, composed of MEREDITH, C.J., ROSE and MACMAHON, JJ.

*John A. Ferguson* and *O. A. Langley*, for the appeal, contended that Tanner having made his assignment prior to the passing of the statute in April, 1895, 58 Vict. ch. 23 (O), he was not amenable to its provisions, and the Act being penal was not retrospective.

*Aylesworth*, Q.C., for the assignee, contra.

*John R. Cartwright*, Q.C., Deputy Attorney-General, for the Province of Ontario.

April 23, 1900. MEREDITH, C.J.:—

Judgment.

Meredith, C.J.

By an order of Mr. Justice FALCONBRIDGE, made on the application of the assignee and under the authority of R.S.O. (1897) ch. 147, sec. 36, he has declared that it appears that Charles E. Tanner, the appellant, has, on his examination taken before the Local Registrar at Sarnia, under the provisions of the same Act, refused to disclose his transactions respecting his property, and the property of the firm of Lucas, Tanner & Co., and did not make satisfactory answers respecting the same, and that it also appears from the same examination that the said Charles E. Tanner had concealed or made away with his property and the property of the said firm in order to defeat or defraud his creditors, or some of them, in the particulars set forth in the notice of motion served, and he has ordered Tanner to be committed to the common gaol of the County of Lambton for the term of two months, and from that order Tanner has appealed to this Court.

The assignment was made by the firm on the 11th February, 1893, and by Tanner individually on the 31st January, 1895.

The acts of concealment or making away with the property of the appellant and of the firm in order to defeat or defraud creditors, which have been found to be established by the examination of the appellant, were done before the 11th February, 1893.

The provision for the examination of an assignor, and for his committal, which are found in the Revised Statute, were not in force when either of the assignments was made, having been first enacted by 58 Vict., ch. 23 (O), which came into force on the 16th April, 1895.

There was argument by all the counsel on the question of the statute being *ultra vires* of the Legislative Assembly of the Province of Ontario, but as the judgment of the Court proceeded upon another point, it is not referred to.—Rep.

Judgment.

Meredith, C.J.

Upon the opening of the appeal, a question was suggested which does not appear to have been raised before my brother Falconbridge as to the provisions of sec. 36 in as far as it deals with these acts not being within the competence of the Legislature of Ontario to enact, and an argument on this point was directed to be had, and notice having been given to the Attorney-General of the Dominion of Canada and to the Attorney-General of the Province of Ontario, the appeal came on to be heard on the 26th February, 1900, when counsel appeared for the parties to the appeal, and for the Attorney-General of the Province, but not for the Attorney-General of the Dominion.

If it were possible to read the provisions of the section which are in question as applying only to acts of the assignor in concealing or making away with property which had passed by the assignment to his assignee, it would probably be unnecessary to consider the constitutional question which has been raised, because in that case it might be said that the section is one which merely provides the sanction necessary for making effective the assignment for the purpose for which it was intended—the application of the assignor's estate for the payment of the claims of his creditors in accordance with the provisions of the Act.

It is, however, in my opinion, impossible to so limit the meaning of the language in which the Legislature has expressed its will. The conditions upon the existence of which the power to make the order depends are that an assignment has been made for the benefit of creditors; that the assignor has been examined and that it is made to appear by his examination that he has concealed or made away with his property in order to defeat or defraud his creditors or any of them.

Section 36 must, I think, be read in the light of section 34, which authorizes the examination to be had, and prescribes what the scope of it shall be; which includes an enquiry as to the estate and effects of the

assignor, and as to the property and means he had when the earliest of his debts or liabilities existing at the date of the assignment was incurred, and as to the property and means he still has of discharging his debts and liabilities, and as to the disposal he has made of any property "since contracting such debt or incurring such liability," . . . and it seems to me that the property referred to in section 36 must be taken to be any property which had been possessed by the assignor at the time of contracting the earliest of his debts or incurring the earliest of his liabilities which existed at the date of the assignment; and the fraudulent concealment of or making away with the assignor's property to cover any such dealing with it between the date when the earliest debt was contracted or liability incurred and the time of the examination, unless the application of the Act is to be limited to punishment for such acts only as were committed after it was passed.

Judgment.  
Meredith, C.J.

Had it been intended to limit the operation of the Act, as it was suggested that it is to be limited, one would have expected very different language to have been employed, and I am quite unable, without doing violence to the language of the section, to so read it, and such violence is not, in my opinion, to be justified, even if the effect of it be to make legislation which would otherwise not be within the competence of the Legislature by which it was enacted within its competence.

Similar language applied to judgment debtors was employed by the Legislature in R.S.O. 1877, ch. 49, sec. 18, and ch. 50, sec. 305, now Con. Rule 907, and also in 22 Vict., ch. 96, sec. 13, and it would be an anomalous result if the same language is to have given to it a different meaning in the legislation in question to that which is to be taken to be its meaning in the other legislation to which I have referred.

It was further argued that the legislation in question being, as it unquestionably is, penal in its nature, and the

Judgment.

Meredith, C.J.

committal not in the nature of execution process : *Henderson v. Dickson* (1860), 19 U.C.R. 592; *Ward v. Armstrong* (1867), 4 P.R. 58; *Jones v. Macdonald* (1893), 15 P.R. 345, is not to be applied to acts done before the passing of the Act, 58 Vict., ch. 23 (O).

This contention is, in my opinion, well founded.

The effect of the wider construction would be to hold that the Legislature has *ex post facto* provided for the punishment under its laws of acts of fraudulent concealment and making away with property by a debtor, acts which did not before constitute an offence against any provincial law, though punishable as a crime under Dominion legislation. Such a construction ought not to be adopted unless it is impossible otherwise to interpret the language used, and, in my opinion, it is not only not impossible to do that, but upon the established rules for the construction of statutes, the provision in question is to be read as having reference to acts done after the passing of the Act: *Hardcastle's Construction of Statutes*, 2nd ed. p. 369, et seq. As to the difference between retrospective and *ex post facto* statutes, *Calder v. Brett* (1798), 3 Dallas, at p. 390; *Blackstone's Commentaries*, Lewis' ed. Vol. I., p. 46.

I am unable to see any difference between the provisions in question and a provision of a criminal statute that whoever shall have concealed or made away with his property with the same intent to defraud shall be deemed guilty of an indictable offence; and it is clear, I apprehend, that such a provision would not extend to acts done before the Act was passed.

The words "where there has been an assignment" in section 34, are not inconsistent with this view. It may well be that the Legislature intended that the right to examine should exist in cases where an assignment had already been made, but did not intend to do that which it is recognized in all civilized countries a Legislature ought not to do—to provide by *ex post facto* laws for the

punishment of acts already committed. The power to commit for not attending, refusing to disclose, or making unsatisfactory answers is not open to the same objection, for all of these are acts which the person who does them knows to be punishable under the provisions of sec. 36.

Judgment.

Meredith, C.J.

Having come to this conclusion, it is unnecessary, and would therefore be improper, to express any opinion upon the constitutional question which has been raised, and argued.

The acts for which the appellant has been directed to be imprisoned were done, if at all, before the passing of 58 Vict., ch. 23, (O.) and the order cannot therefore be upheld unless it can be supported upon the ground that the appellant has violated some or one of the provisions of section 36 other than those dealing with the fraudulent concealment or making away with property, as to which, if the respondent desires it, the appeal may be further argued.

ROSE, J. :—

I agree in the result. Even if the provision is confined to acts done after the assignment, it must also be confined to acts done prior to the passing of the statute, and the result in this case would be the same.

MACMAHON, J. :—

I agree in the result.

G. A. B.

## [DIVISIONAL COURT.]

## KELLY V. DAVIDSON.

*Master and Servant—Foreman—Negligence—Evidence—Finding of Jury.*

## Statement.

THIS was an appeal by the plaintiff from the judgment of MACMAHON, J., 31 O.R. 521, dismissing the action, which was brought, under the Workmen's Compensation for Injuries Act, to recover damages for injuries sustained by the plaintiff, a carpenter, through a fall caused by the giving way of a stay in the scaffolding of a building in course of erection by the defendant, a contractor.

The action was tried with a jury, and certain questions were left to them, which, with their answers thereto, are set out in the former report.

The 3rd question and the answer thereto were as follows: "If the stay was defective, was the defect not discovered owing to the negligence of Davidson or of the foreman James Kelly?" Ans.: "Yes. Because not discovered through the negligence of the foreman."

MACMAHON, J., in giving judgment after the findings of the jury, held that there was no evidence of negligence on the part of James Kelly, the foreman.

The appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ., on the 14th June, 1900.

*H. E. Irwin*, for the plaintiff, contended that upon the findings of the jury the judgment should have been for the plaintiff.

*Clute*, Q.C., (*A. R. Clute* with him), for the defendant, conceded that if the third finding were allowed to stand, the judgment must be for the plaintiff, but contended that there was no evidence to support it.

THE COURT held that there was evidence sufficient to support the finding, and it could not be interfered with or disregarded; and therefore allowed the appeal with costs, and directed judgment to be entered for the plaintiff for \$500, the damages awarded by the jury, with costs.

Judgment.

E. B. B.

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KIRBY ET AL. V. THE RATHBUN COMPANY.

*Company—Winding-up—Mortgage to Creditor—Setting Aside—Insolvency—Knowledge—“May be Set Aside”—Presumption—Rebuttal—R.S.C. ch. 129, secs. 68-71.*

A mortgage of land made by an incorporated company in favour of a creditor within thirty days prior to the beginning of winding-up proceedings, was attacked by the liquidator as being void under some of the provisions of secs. 68 to 71, inclusive, of the Winding-up Act, R.S.C. ch. 129:—

*Held*, notwithstanding the fact that the mortgage was given upon demand of the mortgagee, that the transaction must be avoided under sec. 69, the mortgage being a conveyance for consideration, respecting real property, by which creditors were injured or obstructed, made by a company unable to meet its engagements; and it was not material under this section whether the mortgagee was or was not ignorant of such inability; but the transaction, being within the thirty days, was voidable, and should, therefore, be set aside, that being the effect of the words “may be set aside.”

*Held*, also, that the words of sec. 69, “upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders,” were not applicable to the giving of a mortgage as security for a past debt.

*Held*, also, that none of the other sections relied on applied so as to avoid the mortgage; and, following *Lawson v. McGeoch* (1892-3), 22 O.R. 474, 20 A.R. 464, and distinguishing *Webster v. Crickmore* (1898), 25 A.R. 97, that the presumption referred to in sec. 71 is rebuttable.

THIS action was brought by Thomas Sidney Kirby, liquidator of the Canadian Granite Company (limited) and the Canadian Granite Company (limited) against the Rathbun Company, to set aside a mortgage of lands made by the plaintiff company before liquidation to the defendants.

Statement.



**Statement.**

The statement of claim set forth:

(2.) That by indenture of mortgage dated the 15th April, 1899, the plaintiff company mortgaged to the defendants certain lands in the city of Ottawa, and thereby purported to secure the repayment by the plaintiff company to the defendants of a pretended consideration of \$3,000.

(3.) That on the 5th May, 1899, an order was made by the High Court of Justice for Ontario under the Winding-up Act, R.S.C. ch. 129, and amending Acts, for the winding up of the plaintiff company, and the plaintiff Kirby was appointed liquidator thereof.

(4.) That the mortgage of the 15th April, 1899, was made with intent fraudulently to impede, obstruct, and delay the creditors of the plaintiff company (other than the defendants) in their remedies against the plaintiff company, and with intent to defraud such creditors, and that the same was so made, done, and intended with the knowledge of the defendants, and had and would have the effect of impeding, obstructing, and delaying such creditors, and that the same was null and void under the provisions of the Winding-up Act.

(5.) That the said mortgage was a gratuitous contract, and was made without consideration or with a merely nominal consideration, within the meaning of the provisions of the Winding-up Act, and had and would have the effect of injuring, obstructing, and delaying the creditors, and that the plaintiff company at and prior to the making of the mortgage was unable to meet its engagements, and that the defendants knew of such inability, or had probable cause for believing such inability to exist.

(6.) That on and prior to the 15th April, 1899, the defendants were creditors of the plaintiff company, and the mortgage was made, in contemplation of insolvency, by way of security for the then existing indebtedness of the plaintiff company to the defendants, and that by reason thereof the defendants had obtained an unjust preference over other creditors.

(7.) That the mortgage was made by the plaintiff company at a time when it was unable to meet its engagements, and, having been made within thirty days next before the commencement of the winding-up under the Act, was voidable thereunder, and should be declared null and void and set aside.

Statement.

(8.) That the plaintiff Kirby had been duly authorized in the winding-up proceedings to bring this action.

And the plaintiffs claimed a declaration that the mortgage was null and void and should be set aside under the provisions of the Act, an order for a reconveyance, an injunction, and general relief.

The statement of defence alleged:

(2.) That on the 15th April, 1899, the plaintiff company was indebted to the defendants in \$1701.61, and on that date made three promissory notes for sums in all equal to that sum and interest in favour of the defendants, payable in two, three, and four months.

(3.) That the mortgage attacked was made by way of collateral security for the payment of the notes.

(4.) That by an indenture of agreement made between the plaintiff company and the defendants on the 15th April, 1899, it was agreed that the plaintiff company would pay at least a certain part of what was due upon the notes at the respective dates of maturity, and would fully pay the balance by the 31st December, 1899, the date of maturity of the mortgage, and that the defendants would discharge the mortgage upon payment of the sum of \$1701.61.

(5.) That at and prior to the making of the mortgage the plaintiff company asserted to the defendants that the plaintiff company was perfectly solvent and able to meet its engagements in full, and the defendants did not know of the alleged inability, nor had they probable cause to believe it to exist; that the plaintiff company was able to meet its engagements in full, and did not make the mortgage with fraudulent intent.

Statement.

(6.) That the mortgage was not a gratuitous contract, but was given for valuable consideration, namely, the existing indebtedness and the extension of the time for payment.

(7.) That at and prior to the making of the mortgage the defendants made many demands for payment of the debt, but the plaintiff company always refused to pay the same, and upon such refusal the defendants threatened to take legal proceedings, whereupon the plaintiff company asked for time and offered as security the mortgage now attacked, which the defendants accepted; that there was therefore "pressure," and no unjust preference.

The action was tried before ROSE, J., without a jury, at Ottawa, on the 22nd March, 1900.

*Orde*, for the plaintiffs.

*Hogg*, Q.C., for the defendants.

July 4, 1900. ROSE, J.:—

The mortgage in question was attacked under secs. 68 to 71, inclusive, of the Winding-up Act, R.S.C. ch. 129.\*

\* 68. All gratuitous contracts, or conveyances or contracts without consideration, or with a merely nominal consideration, respecting either real or personal property, made by a company in respect to which a winding-up order under this Act is afterwards made, with or to any person whatsoever (whether such person is its creditor or not), within three months next preceding the commencement of the winding-up or at any time afterwards,—and all contracts by which creditors are injured, obstructed, or delayed, made by a company unable to meet its engagements and in respect to which a winding-up order under this Act is afterwards made, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious (whether such person is its creditor or not) shall be presumed to be made with intent to defraud its creditors.

69. A contract or conveyance for consideration, respecting either real or personal property, by which creditors are injured or obstructed, made by a company unable to meet its engagements with a person ignorant of such inability, whether such person is its creditor or not, and before such inability has become public and notorious, but within thirty days next before the commencement of the winding-up of the business of such company under this Act, or at any time afterwards, is voidable, and may be set aside by any Court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders.

70. All contracts or conveyances made and acts done by a company, respecting either real or personal property, with intent fraudulently to

It was made by the plaintiff company in favour of the defendant company within thirty days prior to the beginning of the winding-up proceedings.

Judgment.

Rose, J.

The first part of sec. 68 does not apply, as it relates to gratuitous contracts or conveyances, or contracts without consideration. The second part of sec. 68 does not in terms apply, as it refers to contracts only, and not contracts or conveyances. But, even if contracts should be held to include conveyances, it does not apply on the facts of this case, because I do not find that there was any intent to defraud creditors by either the mortgagor or mortgagee.

I pass by sec. 69 for the present.

Section 70 does not apply, because I find on the facts here that there was no fraudulent intent on the part of the company fraudulently to impede, obstruct, or delay its creditors, and even if the proper inference should be that there was such an intent, I do not find that that intent was known to the mortgagee.

I do not think sec. 71 applies, because I do not find that the mortgage was given in contemplation of insolvency, and the presumption referred to in the last clause of such section is, I think, rebutted by the facts of the case.

impede, obstruct or delay its creditors in their remedies against it, or with intent to defraud its creditors or any of them,—and so made, done, and intended, with the knowledge of the person contracting or acting with the company, whether such person is its creditor or not,—and which have the effect of impeding, obstructing or delaying the creditors of their remedies, or of injuring them, or any of them, shall be null and void.

71. If any sale, deposit, pledge or transfer is made of any property, real or personal, by a company in contemplation of insolvency under this Act, by way of security for payment to any creditor,—or if any property, real or personal, movable or immovable, goods, effects or valuable security, are given by way of payment by such company to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void; and the subject thereof may be recovered back for the benefit of the estate by the liquidator, in any Court of competent jurisdiction; and if the same is made within thirty days next before the commencement of the winding up under this Act, or at any time afterwards, it shall be presumed to have been so made in contemplation of insolvency.

Judgment.

Rose, J.

In holding that the presumption referred to in sec. 71 is rebuttable, I refer, without repeating, to what I said in *Lawson v. McGeoch* (1892), 22 O.R. 474, 477; see in appeal (1893), 20 A.R. 464. In *Webster v. Crickmore* (1898), 25 A.R. 97, the language of the statute then under consideration was quite different. In it were the words, "whether the same be made voluntarily or under pressure." Such words are not in sec. 71. Even with such language in the Act, see observations of Moss, J.A., at p. 102.

I find as a fact that the mortgage in question was given upon demand of the mortgagee; the object of the company in giving it was to avoid the issue of a writ of summons and to gain time, in hope that with an extension of time the plaintiff company might be able to continue its business and avoid insolvency.

Notwithstanding these findings, I think the transaction must be avoided under sec. 69. This was a conveyance for consideration respecting real property, and by which creditors were injured or obstructed, made by a company unable to meet its engagements. It is not material under this section whether the mortgagee was or was not ignorant of such inability; but, being made within thirty days next before the commencement of the winding-up of the business of the company, the transaction is voidable, and may be set aside by any Court of competent jurisdiction, which, I take it, means should be avoided and set aside upon such facts appearing. Since the amendment of the Act, this section applies to transactions with creditors.

I am not able to give the defendant company any advantage from the provision of the section found in the following words, "upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders." Such words are not, as far as I can see, applicable to such a transaction as the giving of a mortgage as security for a past debt.

There must be judgment for the plaintiffs declaring the conveyance void and setting the same aside with costs.

E. B. R.

## ARMSTRONG V. JOHNSTON.

*Bankruptcy and Insolvency—Preference—Promise to Give Security—Presumption—Rebuttal—Payment—Transfer of Security—Cheque—Promissory Notes—Discount by Third Person.*

In April, 1898, a firm of traders, desiring to purchase goods, obtained from a bank accommodation to the extent of about \$8,200 for the purpose of buying them, upon promissory notes indorsed for their accommodation by the defendant, a brother of one of the partners; they promising him to retire the notes out of the proceeds of the sales of the goods. The proceeds were not so applied, to the defendants' knowledge, and the notes were from time to time renewed in full, the defendant indorsing them upon each renewal. He was satisfied by a general promise that they would secure him, but no security was ever definitely mentioned, nor did he ever press for it. On the 27th May, 1899, the firm sold out their assets for nearly \$11,000, their liabilities being about \$19,000. Before the sale was carried out the defendant became aware that the firm was insolvent. The purchase money was paid to the firm, \$1,000 in cash, \$5,000 by a cheque to their order, and the remainder by promissory notes. The firm handed over the cash to the defendant, and indorsed the cheque and some of the notes to him, and he with the cash and the proceeds of the cheque and notes, the latter being at his request indorsed and discounted for him by a stranger, retired all the notes upon which he was liable, and paid, besides, some rent, taxes, and other debts due by the firm. On the 2nd June, 1899, the firm assigned to the plaintiff for the benefit of their creditors; and this action was afterwards brought to recover from the defendant the amount applied in retiring the notes, upon the ground that he had been unjustly preferred:—

*Held*, that the promise to give the defendant security could only mean that the firm, being unable to pay or secure the notes for fear of bringing on immediate insolvency, would pay or secure them in the future in case their affairs should become desperate, and such a promise was not sufficient to rebut the statutory presumption of a preference.

The payment of \$1,000 in cash to the defendant could not be attacked, and that should be treated as having formed part of the sum of \$5,200 paid to retire two of the notes.

The \$5,000 cheque transferred to the defendant was not a payment in cash, but was the transfer of a security, and he was liable to repay the proceeds of it, less the portion expended in paying debts, etc., of the firm.

The notes indorsed by the firm, and handed to the defendant for the purpose of procuring the payment of the remaining note which he had indorsed for them, were handed by him to the stranger in pursuance of that purpose, and what the latter did was done for the defendant, and not for the firm, and must be treated as if done by the defendant himself.

ACTION tried before STREET, J., at London, on the 14th May, 1900, without a jury. The facts are stated in the judgment.

Statement,

*Gibbons*, Q.C., for the plaintiff.

*Magee*, Q.C., for the defendant.

Judgment.

July 3, 1900. STREET, J. :—

Street, J.

The plaintiff is the assignee for the benefit of the creditors of a firm called the Western Shoe Company, carrying on business at London, Ontario, the members of which were one W. J. Johnston and one J. S. Ashplant. The assignment was made on the 2nd June, 1899. The circumstances giving rise to the action were as follows:— In April, 1898, the Western Shoe Company desired to purchase a particular stock of goods, and obtained from the Bank of Toronto accommodation to the extent of about \$8,200 for the purpose of buying them, upon notes which the defendant, E. H. Johnston (who is a brother of W. J. Johnston), indorsed for the accommodation of the Western Shoe Company, they promising him to retire the notes out of the proceeds of the sales of the goods. The proceeds of these sales were not so applied, and the notes were from time to time renewed in full, the defendant indorsing them upon each renewal, and being aware that the proceeds of the sales of the goods were not being applied as promised. He was satisfied by a general promise that they would secure him, but no security was ever definitely mentioned, nor did he ever press that it should be given.

On the 27th May, 1899, the Western Shoe Company sold out their assets to one Forsythe for \$10,770.75, their liabilities being about \$19,000. The defendant, E. H. Johnston, acted as solicitor for the Western Shoe Company in drawing the papers relating to the sale and in carrying it out, and he became fully aware before the sale was carried out that the company was hopelessly insolvent. Forsythe paid the purchase money for the assets of the company as follows:—

Cash, - - - -	\$1000.00	Judgment.
Cheque of one Anderson upon the Standard Bank in Chatham, payable to the Western Shoe Company or order, - -	5000.00	Street, J.
4 notes for \$1182, \$1222, \$1183, and \$1183.75, at 2, 4, 6, and 8 months respectively, made by Forsythe, payable to one Ander- son or order, and indorsed by him to the company, - -	4770.75	
	<hr/> \$10,770.75	

The \$1000 cash was handed to the defendant, and the cheque for \$5000 was indorsed to him by the company. He deposited the \$1000 and the cheque to his own credit in the Bank of Toronto, and out of the amount so deposited he paid to the bank two of the notes of the company upon which he was indorser for \$2800 and \$2400 respectively, both of which were current. The remaining \$800 was paid out by him in settling other debts of the company at their request. W. J. Johnston, the defendant's brother, then, for the Western Shoe Company, indorsed three of Forsythe's notes in the name of the company, and handed them to the defendant, telling him to discount them with the Canadian Bank of Commerce, and to pay out of the proceeds the remaining note in the Bank of Toronto upon which the defendant was liable as indorser. The defendant took the notes to the manager of the Canadian Bank of Commerce at London for this purpose, and was told that he must indorse them in order to obtain the money. Instead of indorsing them himself, he handed them over to another brother, Charles D. Johnston, who indorsed them and discounted them in his own name, and received the proceeds from the bank upon his own receipt. Out of these moneys Charles D. Johnston paid the note for \$3000 in the Bank of



Judgment.  
Street, J.

Toronto upon which the defendant was liable as indorser. On the 2nd June, 1899, the Western Shoe Company made an assignment to the plaintiff for the benefit of their creditors; and the present action is brought by him to recover from the defendant the \$8200 applied in payment of the notes in the Bank of Toronto, upon the ground that it was an unjust preference.

No explanation is given as to why the promise to give the defendant security was not performed by the Western Shoe Company, and I am left to draw my own conclusions from the simple facts of the case. I think the defendant must have been able to see that the Western Shoe Company were in straitened financial circumstances (although not aware of their being actually insolvent) when they were unable to keep their original promise to him to pay these notes out of the proceeds of the goods which had been purchased upon his indorsement. They were unable, apparently, to pay a dollar upon them. A promise on their part, under these circumstances, of the vague character of that stated by the defendant, could mean little more than that they would protect him as far as possible in case of trouble, because it could hardly fail to be apparent that the giving of security for these notes upon any of their available assets would mean simply immediate insolvency. In the result, therefore, the reason why the security was not pressed for by the defendant was the knowledge that to insist upon it must lead to that result. In plain terms, a promise such as that set up here, given under the circumstances appearing in or deducible from the evidence here, could only mean that the Western Shoe Company, being unable at present to pay or secure the notes for fear of bringing on immediate insolvency, would pay or secure them in the future in case their affairs should become actually desperate. Such a promise has never been held to be one sufficient to rebut a presumption such as the statute here raises, and cannot justify a preference: *Webster v. Crickmore* (1898), 25 A.R. 97; *Ex*

*p. Fisher* (1872), L.R. 7 Ch. 636; *Cassels's Assignments Acts*, 3rd ed., p. 14.

Judgment.

Street, J.

Under the authorities, the payment of the \$1000 cash to the defendant cannot be attacked, and that should be treated, I think, as having formed part of the \$5200 paid upon the first two notes, because it might lawfully be so applied. The \$5000 cheque transferred to him was not "a payment in cash," but was the transfer of a security, and he is liable to repay the proceeds of it, less the \$800, which he properly paid out upon rent, taxes, etc., for the company: *Davidson v. Fraser* (1896), 23 A.R. 439.

I am further of opinion that the three notes indorsed by the Western Shoe Company and handed to the defendant for the purpose of procuring the payment of the remaining note which he had indorsed for them, were handed by him to Charles D. Johnston in furtherance of that purpose, and that what Charles D. Johnston did was done for the defendant and not for the company, and must be treated as if done by the defendant himself: *Botham v. Armstrong* (1876), 24 Gr. 216; *Churcher v. Cousins* (1869), 28 U.C.R. 540.

There will, therefore, be judgment for payment by the defendant to the plaintiff of \$7200, with interest from the 2nd June, 1899, and of the costs of the action.

E. B. B.

## [DIVISIONAL COURT.]

## REGINA V. ROCHE.

*Municipal Corporations—By-law—Transient Traders—Conviction—Penalty—Costs—Imprisonment—Distress.*

The defendant was convicted before a justice of the peace for that she did on a certain day, and at other times since, occupy premises in the town of B., and did carry on business on said premises by selling dry goods, she not being entered on the assessment roll of the town for income or personal property for the current year, and not having a transient trader's license to do business in the town, as required by a certain by-law of the town; and was adjudged for her offence to forfeit and pay the sum of \$50 (to be applied on taxes to become due) to be paid and applied according to law, and also to pay to the justice the sum of \$11.45 for his costs in that behalf; and if these sums were not paid forthwith, she was adjudged to be imprisoned.

The first clause of the by-law provided that every transient trader who occupied premises in the municipality and who was not entered in the assessment roll, and who might offer goods or merchandise for sale, should take out a license from the municipality. The second clause provided that every other person who occupied premises in the municipality for a temporary period should take out a license. The eighth clause provided for the imposition of a penalty for a breach of any of the provisions of the by-law, and that, in default of payment of the penalty and costs, the same should be levied by distress, and authorized imprisonment in default of distress:—

*Held*, that the defendant was not brought within either the first or second clause of the by-law, as it was not alleged or charged that she was a transient trader or that she occupied premises in the municipality for a temporary period; and these omissions were fatal to the conviction.

*Regina v. Caton* (1888), 16 O.R. 11, followed.

*Held*, also, that the conviction was open to objection because of the application of the penalty, the award of the costs to the justice, instead of to the informant, and the award of imprisonment upon default in payment of the penalty.

The conviction was quashed, and costs were given against the informant.

## Statement.

THE defendant was, on the 30th March, 1900, at Barrie, in the county of Simcoe, convicted before a justice of the peace for that county for that she did on the 9th day of March, A.D. 1900, and at other times since the said date, occupy premises in the said town of Barrie under the firm name of "Danford Roche & Co.," and did carry on business on said premises by selling dry goods in a certain store in Dunlop street, Barrie; the said defendant, in her own name or under the name of Danford Roche & Co., not being entered on the assessment roll of the town of Barrie for either income or personal property for the

current year, and not having a transient trader's license to do business in said town of Barrie, as required by by-law No. 430 of the by-laws of the said town of Barrie; and was adjudged for her said offence to forfeit and pay the sum of \$50 (to be applied on taxes to become due) to be paid and applied according to law, and also to pay to the said justice the sum of \$11.45 for his costs in that behalf; and if the said several sums were not paid forthwith, she was adjudged to be imprisoned in the common gaol of the said county, at Barrie, in the said county of Simcoe, for the term of twenty-one days.

Statement.

This conviction being brought before the Court on *certiorari*:—

*F. J. Roche*, on the 10th May, 1900, obtained an order *nisi* calling upon the prosecutor and the convicting justice to shew cause why the same should not be quashed, with costs to be paid by them, or by one of them, to the defendant, upon the following grounds:—

1. The evidence does not shew and the conviction does not find or charge that the said defendant was a transient trader or other person who occupied premises in the said town of Barrie for a temporary period.

2. The evidence shews that the defendant is lessee for a year, renewable, of the premises held by her, and that the same have been held since 1st August, 1899, and that if her name was not on the assessment roll for 1900 of the town of Barrie, it was through no fault of hers, but in consequence of the plan or contrivance of the informant and the town assessor, and in breach of their duty, and for the express purpose of procuring the conviction of the defendant, during March, 1900, of an alleged offence under said by-law.

3. The by-law for offending against which the conviction is made is illegal and not capable of being enforced because not limited to transient traders or other persons occupying premises in the municipality for temporary periods.

## Statement.

4. The information was not laid within six months after the matter of the complaint arose.

5. The conviction does not negative the exception in the statute and by-law of the sale of an insolvent estate.

6. The evidence shews the defendant is a married woman, and such an one cannot be imprisoned in default of distress.

On the 8th June, 1900, before a Divisional Court, composed of ARMOUR, C.J., and STREET, J., *Roche* supported the order *nisi*, and cited *Regina v. Smith* (1899), 31 O.R. 224; *Regina v. Applebe* (1899), 30 O.R. 623; *Regina v. Langley* (1899), 31 O.R. 295; *Regina v. Caton* (1888), 16 O.R. 11; *Regina v. Cuthbert* (1880), 45 U.C.R. 19, 24.

*G. W. Lount*, for the complainant, referred to *Regina v. Coulson* (1896), 27 O.R. 59, 62.

June 13, 1900. The judgment of the Court was delivered by

ARMOUR, C.J.:—

I do not think that this conviction can be upheld.

The first clause of the by-law provides that "every transient trader who occupies premises in the municipality of the town of Barrie and who is not entered on the assessment roll of said municipality, or who may be entered for the first time in the assessment roll of such municipality, in respect of income or personal property, and who may offer goods or merchandize of any description for sale by auction or in any other manner conducted by himself or by a licensed auctioneer or by his agent or otherwise, shall before commencing to trade first take out a license from the said municipality."

And the second clause provides that "every other person who occupies premises in the municipality of the town of Barrie for a temporary period, and whose name has not been duly entered on the assessment roll in respect

of income or personal property for the then current year, and who may offer goods or merchandize of any description for sale by auction or in any other manner conducted by himself or by a licensed auctioneer or otherwise, shall before commencing to trade take out a license from the said municipality."

Judgment.

Armour, C.J.

And the third clause provides that "every transient trader and every such other person shall before commencing to trade take out a license therefor from the said municipality, and shall pay by way of said license the sum of fifty dollars."

And the eighth clause provides that "any person convicted of a breach of any of the provisions of this by-law shall forfeit and pay, at the discretion of the convicting magistrate, a penalty not exceeding the sum of fifty dollars for each offence, exclusive of costs, and in default of payment of the said penalty and costs, or costs only, forthwith, the said penalty and costs, or costs only, may be levied by distress and sale of the goods and chattels of the offender, and in case of there being no distress found out of which such penalty can be levied, the convicting magistrate may commit the offender to the common gaol of the county of Simcoe, with or without hard labour, for any period not exceeding twenty-one days, unless the said penalty and costs be sooner paid."

It is not alleged or charged that the defendant was a transient trader, and so the defendant is not brought within the first clause of the by-law.

And it is not alleged or charged that the defendant occupied premises in the municipality of the town of Barrie for a temporary period, and so the defendant is not brought within the second clause of the by-law.

A like objection was held to be fatal to the conviction in *Regina v. Caton* (1888), 16 O.R. 11.

The conviction is also open to objection on the ground of the application of the penalty, the award of the costs to the justice instead of to the informant, and in awarding

Judgment.  
Armour, C.J.

imprisonment upon default in payment of the penalty, instead of directing the penalty to be levied by distress, and in default of sufficient distress awarding imprisonment.

The order *nisi* must, therefore, be made absolute quashing the conviction, with costs to be paid by the informant.

E. B. B.

### CAMERON V. OTTAWA ELECTRIC R.W. CO.

#### *Trial—Jury—Incompetency of jurors.*

A new trial was ordered, upon payment of costs, where it was shewn that one of the jurors was not selected to be of the panel, that another was so deaf that he was not able to hear some of the most important evidence, and that a third was in such friendly relations with the defendants, an incorporated company, as should have induced him to decline to sit on the trial.

Statement.

THE plaintiff was injured in alighting from a car of the defendants in which she was a passenger, and brought this action to recover damages for her injuries.

The action was tried at Ottawa before FALCONBRIDGE, J., and a jury.

The evidence shewed that there was an alarm raised that the car in which the plaintiff was seated was on fire, and that she thereupon attempted to alight, when, just as she was stepping off, the car gave a jerk and she was thrown to the ground. The witnesses did not agree as to whether the car was or was not in motion at the time.

The jury found a verdict for the defendants, and judgment was directed to be entered thereon.

The plaintiff moved to set aside the verdict and for a new trial upon the ground that the verdict was against evidence, and upon affidavits shewing (1) that the foreman of the jury had formerly been a shareholder in the defendants' company, and, besides, was connected by marriage with the secretary of the company, and also with one of the principal shareholders; (2) that another juror was hard of hearing, and could not hear the evidence of certain women called as witnesses for the plaintiff; and (3) that a third juror was not in the panel at all, but was summoned by mistake for one of the panel.

The motion was heard by a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ., on the 11th and 12th June, 1900.

*Aylesworth*, Q.C., and *G. F. Henderson*, for the plaintiff, referred to *Bailey v. Macaulay* (1849), 19 L.J. N.S.Q.B. 73, as to the effect of having on the jury one who has an interest in the subject of the action; and to *Norman v. Beaumont* (1744), Willes 484, *Wells v. Cooper* (1874), 30 L.T. N.S. 721, and *Rex v. Tremaine* (1826), 7 D. & Ry. 684, as to the effect of a person not selected as a jurymen sitting upon a jury.

*Riddell*, Q.C., and *H. E. Rose*, for the defendants, cited *Hill v. Yates* (1810), 12 East 229, 231*n*, *Falmouth v. Roberts* (1842), 9 M. & W. 469, and sec. 138 of the Jurors' Act, R.S.O. ch. 64, as to a juror not in the panel; *Richardson v. Canada West Farmers' Ins. Co.* (1867), 17 C.P. 341, *Williams v. Great Western R.W. Co.* (1858), 3 H. & N. 869, and sec. 109 of the Judicature Act, as to the disqualification of a juror for interest; and *Council of Brisbane v. Martin*, [1894] A.C. 249, 252, and *Hutchinson v. Canadian Pacific R.W. Co.* (1888-9), 17 O.R. 347, 16 A.R. 429, as to interfering with the verdict of the jury upon the preponderance of evidence.

*Aylesworth*, in reply, as to the last point, cited *Rowan v. Toronto R.W. Co.* (1899), 29 S.C.R. 717; *Pearse v. Schweder*, [1897] A.C. 520; *Grieve v. Molsons Bank* (1885), 8 O.R. 162.

June 15, 1900. BOYD, C.:—

I think the trial was not satisfactorily conducted for three reasons. First, one of the jurymen was not selected to be of the panel; he was a stranger to the proceedings, wrongly summoned, and so of doubtful competency to adjudicate upon the case. Second, one of the jurymen was so deaf that he was not able to hear some of the most important evidence in the case given by women witnesses. Third, one of the jury was in such friendly relations with



Judgment.

Boyd, C.

the company defendant as should have induced him to disclose the matter and decline to sit on the trial. Had a full disclosure been made of his connection with the company and its officers when the question arose during the trial as to his being a shareholder,\* there is no doubt that relief would have been given under the statute (sec. 109 of the Judicature Act)† or by a postponement of the case.

This juror was in truth one of the judges in the case, and the same reasons which induce Judges to abstain from trying cases where they have a personal interest, should operate with jurymen also, so that they should disclose their interest or ask to be relieved.

It is essential to the maintenance of public confidence in the jury system, not only that the trial should be fairly conducted, but that it should appear to the parties and those interested to be fairly conducted; and that element is lacking in the present case.

A juror with pecuniary or personal interest in the case of either litigant would do well to disclose this fact at the outset; then, if no objection is made, he can be sworn and try the case without risk of suspicion. In the present conjunction of errors, I am not prepared to say that the result has not been affected by the composition of the jury: see *Dovey v. Hobson* (1816), 6 Taunt. 339; *Wells v. Cooper* (1874), 30 L.T.N.S. 721; and *Bailey v. Macaulay* (1849), 13 Q.B. 815 (which is not in accord with *Williams v. Great Western R.W. Co.* (1858), 3 H. & N. 869); *Rex v. Tremaine* (1826), 5 B. & C. 254.

While the plaintiff is not entitled to relief as a matter of right, yet the discretion of the Court may be well

\*During the trial counsel for the plaintiff was told that this juror was at the time a shareholder, but the secretary of the company, being asked about it, said it was not so, and his answer was accepted.

† 109. If at the trial of any action . . . it should be discovered that one of the jury sworn has an interest in the result of the suit or is a relative of any of the parties thereto within the degree of first cousin, the presiding Judge may discharge such juror, and may in any such case direct that the trial . . . shall proceed on such terms as he thinks fit with eleven jurors, and in such case ten jurors may give the verdict or answer the questions submitted to the jury by the Judge.

exercised to permit her to have a new trial on payment of costs.

Judgment.

Boyd, C.

FERGUSON, J., concurred.

MEREDITH, J. :—

This case is one in which the Court may, in its discretion, grant a new trial; but that ought not to be done unless it appears that some substantial injustice may have been caused by the irregularities complained of. No such injustice is very plain to me, and the trial Judge is not prepared to express any dissatisfaction with the verdict, but, as the other members of this Court strongly favour the exercise of the discretion of the Court in favour of the plaintiff, I do not dissent; though I feel called upon to add that the case is dealt with upon its own peculiar circumstances, and is not to be taken as giving a right to a new trial for these irregularities not appearing to have affected the result.

E. B. B.

[DIVISIONAL COURT.]

CRAIG V. CROMWELL ET AL.

*Lien—Mechanics' Lien—"Notice in Writing" to Owner—Letter—R.S.O. ch. 153, sec. 11, sub-sec. 2.*

The claimants of a mechanics' lien for materials wrote to the owner a letter asking him, when making a payment to the contractor "on the Lisgar street buildings"—the property on which the lien was asserted—to "see that a cheque for at least \$400 is made payable to us on account of brick delivered, as our account is considerably over \$700, and we shall be obliged to register a lien if a payment is not made today :"—

*Held*, MEREDITH, J., dissenting, a sufficient "notice in writing" of their lien, under sub-sec. 2 of sec. 11 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. ch. 153.

THIS was an appeal by the Ottawa Brick Manufacturing Company, Limited, claimants of a lien, from the report or judgment of the senior Judge of the County Court of Carleton upon a summary proceeding for the enforcement of a lien under the Mechanics' Lien and Wage-Earners' Act, R.S.O. ch. 153, disallowing the claim of the appellants as against the defendant Cromwell, the owner, upon the

Statement.

Statement.

ground that the appellants had not given "notice in writing of such lien" to the owner before certain payments made by him, as required by sub-sec. 2 of sec. 11 of the Act, set out in the judgment of MEREDITH, J., below. The appellants relied upon a letter (also set out in the judgment of MEREDITH, J.,) as a sufficient notice.

The appeal was heard by a Divisional Court composed of BOYD, C., ROBERTSON and MEREDITH, JJ., on the 22nd February, 1900.

*Thomson*, Q.C., and *R. B. Matheson*, for the appellants contended that, as no special form of notice was required by the section, any writing which gave reasonable notice would be sufficient, and this letter was a good notice. They referred to *Lang v. Gibson* (1885), 21 C.L.J. 74; *McMullen v. Vannatto* (1894), 24 O.R. at p. 630; article in 7 C.L.T. 69.

*Arnoldi*, Q.C., for the defendant Cromwell, contended that the notice must, at least, claim a lien and the benefit of sub-sec. 2, while this letter simply threatened to register a lien—a lien which could affect only twenty per cent. of the contract price—and was, in fact, express notice that the appellants were not invoking sub-sec. 2. He referred to *Burgh v. Legge* (1839), 5 M. & W. 420; *Torrance v. Cratchley* (1900), 31 O.R. 546; Stroud's Judicial Dictionary, "Notice."

May 14, 1900. BOYD, C.:—

I think the letter sent to the defendant by the appellants contains a sufficient notice of the lien claimed for material, and more especially when coupled, as it was, with previous requests. Notice in writing of the lien is all that the statute calls for, sec. 11, sub-sec. 2, and no form of notice is prescribed. Technicalities should not obtain in construing this Mechanics' Lien Act, and what would be deemed sufficient notice as a matter of business should suffice.

Payments made after this did not discharge the lien *quoad* the appellants, and it must be remitted to the Judge (if the parties cannot otherwise agree) to make such changes in his report as are occasioned by the defendant having made payments under the above sub-section after notice of the appellants' lien.

Costs of appeal to be paid by the respondent; other costs in the Court below consequent upon this order to be disposed of by the Judge.

Judgment.

Boyd, C.

ROBERTSON, J.:—

I concur.

MEREDITH, J.:—

The one question argued upon this appeal was, whether the appellants have given a sufficient "notice in writing" of their lien, under the provisions of sub-sec. 2 of sec. 11 of the Act. That section is in these words:

11.—(1) In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise under the provisions of this Act shall, as the work is done or materials are furnished under the contract, deduct from any payments to be made by him in respect of the contract, and retain for a period of thirty days after the completion or abandonment of the contract twenty per cent. of the value of the work, service and materials actually done, placed or furnished as mentioned in section 4 of this Act, and such values shall be calculated on the basis of the price to be paid for the whole contract; Provided that where a contract exceeds \$15,000 the amount to be retained shall be fifteen per cent. instead of twenty per cent., and the liens created by this Act shall be a charge upon the amounts directed to be retained by this section in favour of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

Judgment.

Meredith, J.

(2) All payments up to eighty per cent. (or eighty-five per cent. where the contract price exceeds \$15,000) of such value made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor before notice in writing of such lien given by the person claiming the lien to the owner, contractor or the sub-contractor, as the case may be, shall operate as a discharge *pro tanto* of the lien created by this Act.

(3) Payment of the percentage required to be retained under sub-section 1 may be validly made so as to discharge all liens or charges under this Act in respect thereof after the expiration of the said period of thirty days mentioned in sub-section 1 unless in the meantime proceedings shall have been commenced under this Act to enforce any lien or charge against such percentage as provided by sections 23 and 24 of this Act.

And the writing, relied upon as such notice, is in these words:

"Ottawa, June 17th, 1899.

"Dear Sir,

"When you are making a payment to-day to Mr. Hayner on the Lisgar street buildings, kindly see that a cheque for at least \$400 is made payable to us on account of brick delivered, as our account is considerably over \$700; and we shall be obliged to register a lien if a payment is not made to-day. Yours, &c., The Ottawa Brick Mfg. Co'y, Limited, (Sgd.) "Henry C. Monk, Managing Director."

I agree with the learned County Court Judge that it is not such a notice as the sub-section provides for.

In the first place, it is plain that something of a formal character is required. Verbal notice, however plain and full, and frequent, will not, for this purpose, do. Registration of the lien, in the form and manner required by the Act, even, will not do. Knowledge, though acquired in the amplest manner, or from the plainest writings, unless

the writing be a notice of the lien given by the lien-holder, will not, for this purpose, do.

Judgment.

Meredith, J. 1

Plainly, therefore, I repeat, something of a somewhat formal character is required.

In the words of the sub-section, it must be "notice in writing of *such* lien."

The lien which it now appears the appellants had, on the day of the date of the writing in question, was one upon the buildings and land in question, for the sum of \$949, being the sum then justly due to them from sub-contractors of part of the work in the erection of certain buildings, for materials supplied by the appellants to such sub-contractors and used by the latter in the erection of such buildings.

It did not necessarily follow, from the mere fact of having supplied materials, that the appellants must have had such a lien. They might have contracted themselves out of the benefit of the Act; or might have lost the lien through failure to comply with the provisions of the Act; or might never have intended or desired to have, or enforce, a lien. The lien given by the Act is not one which the Act imperatively forces upon persons, willing or unwilling, but one which the lien-holder may avail himself of if he chooses to do so, and which he loses if he does not avail himself of it within the times, and in the manner, provided for in the Act.

In these circumstances, and having regard to the position of the owner, the difficult and uncertain enough position in which, under the plainest and best of circumstances, he is placed, the least that the notice should do is to inform him of the person giving the notice of a lien, and of the nature and amount of it, and of the other persons and the lands affected by it, and shewing that he intends to enforce his rights under it against the person to whom the notice is given.

And that is what the very words of the Act require; the lien-holder is to give "notice in writing of *such* lien."

Judgment.

Meredith, J.

In the first place, it must be notice, not merely knowledge, or information, or intimation, but "notice in writing." Surely something of a formal character, something which is recognized as notice, as distinguished from knowledge.

Then the notice must be "of *such* lien," not of a lien merely, but such lien as the person giving the notice has under the Act. To ascertain what that is, we must look at the fourth section of the Act, and that section shews, among the many different kinds of liens, that that which these appellants had was one upon certain "buildings and the land occupied and enjoyed therewith" of the respondent, "for the price of such materials" as the appellants had supplied to the contractor to be used in erecting such buildings, limited in amount to the sum justly due to the lien-holders, and to the sum justly due and owing (except as provided in the Act) by the owner to the contractor. That, and nothing less, was "such lien" of which notice in writing was to be given.

Can it fairly be said that the writing in question gives notice of *such* lien?

Can it be said that it really gives notice of any lien at all? It imparts certain indefinite information, and intimates, not that the appellants have, but rather that, if their request is not complied with, they will acquire some lien or right against the owner of the buildings, and so is quite misleading, as the appellants' claim, now made, is of a then-existing lien requiring the owner to withhold payments to his contractor and creditor, and making him liable to pay them over again if he should make any. It does not state to whom the bricks were sold or delivered; nor that they were to be used in the building; nor in respect of what account there is a balance of \$700. It neither gives notice of such lien nor of any existing lien; nor does it even give knowledge of any facts upon which even a professional mind could perceive that the appellants were entitled to a lien, if that would be enough. It is rather just such a demand as a person seeking to attach moneys

by garnishee proceedings would first make: "You owe my debtor: pay me instead of him." It is not that which will put the owner upon inquiry by means of which he may be able to discover what such lien is which is required; it is *notice in writing of such lien*. It would not do to say, "I have a lien; it is registered; go and find out what it is."

Judgment.  
Meredith, J.

A notice partly in writing and partly verbal would not do; it would not do, for instance, to say in writing, "I give you notice of the lien I spoke to you about yesterday." The whole notice, which the statute requires, must be in writing.

One main purpose of requiring notice in writing must have been, like the Statute of Frauds, to prevent the false swearing which permitting verbal notice might occasion, and another purpose no doubt was to prevent constructive notice, by means of registration, being enough.

Yet we are asked to hold that constructive notice, anything that will put a man on inquiry, will do, and to open the gate, to some extent, to evidence of verbal notice.

The Act does not require the owner to spell out as well as he can at his own pains and expense what liens exist; between the claim of his creditor, the contractor, and claims of the lien-holders, and pretended lien-holders, his position is hard enough; and we are not to deprive him of any of his common law rights, or duties, except to the extent that the Act, with reasonable clearness, requires.

Then, in the second place, the Act does throw considerable light on the question of the form of the notice which is to be given.

It was said that there was no provision as to the form of it, and no form to be found anywhere, but that is not quite so.

Section 49 provides that: "The forms in the schedule hereto, or forms similar thereto, or to the like effect, may be adopted in all proceedings under the Act."

So that the forms given in the Act ought to be taken



Judgment.

Meredith, J.

as a guide; and there are three forms of claims of lien provided by which constructive "notice of such lien" by registration is to be given.

In a case where even such constructive notice will not do, but actual notice of the same thing—"such lien"—must be given, surely the latter notice ought to be as ample as the former.

And what is required by these forms? The name and residence of the person claiming the lien, a statement that under the Mechanics' and Wage-Earners' Lien Act such person claims a lien upon the estate of the owner, naming him and his place of residence, in the under-mentioned lands, in respect of services or materials, giving a short description of the work done or materials furnished for which the lien is claimed, or for work done or for wages, giving the amount and the number of days, and stating the name and residence of the person for whom such work was done or materials furnished, and upon whose credit it was done or they were supplied, a statement of the amount claimed, and a description of the land sufficient for registration, and, when credit has been given, of the date when the work was done or materials furnished, and when the period of credit agreed to expired, together with the place and date of the notice.

Can it be reasonably said that the writing in question is similar in form to, or to the like effect as, any of the three forms given; or that it is reasonable to tell the owner, in view of these requirements of the Act, that he must find out for himself all such particulars? That is, find out for himself what *such lien* is?

It is idle to say any form of words will do, for, if that mean that any form which gives notice in writing of such lien will do, the statement does not aid at all; and if it mean less than that, it is inaccurate.

I would dismiss the appeal, with costs, upon the question of notice in writing: but, as there is some evidence that the payment was not made in good faith, and that

question has not been passed upon by the County Court Judge, I would refer the matter back to him, to deal with it, if the appellants desire such a reference.

Judgment.  
Meredith, J.

We were asked to suggest, to the parties to this appeal, a settlement of the amount between themselves, if the notice were held sufficient. I cannot accept a suggestion from counsel upon either side upon such a subject; the danger of so doing, and of acting upon it, is quite apparent in this case; for it is plain that other lien-holders, none of whom are parties to this appeal, have a right to make a claim, if they see fit, to share in the benefit to be derived from the payment over again by the owner of part of the price of his building; and so the suggestion is one under cover of which the appellants might get the money without such lien-holders having an opportunity to make such claims, and with the possibility of the owner being obliged to pay part of the money over again a third time. If I go beyond my power, out of my way, to suggest to any party what course he should take, the suggestion must be entirely my own. I entirely decline to accept any suggestion from any interested person.

E. B. B.

## [DIVISIONAL COURT.]

## WAKEFIELD ET AL. V. WAKEFIELD ET AL.

*Tenant for Life—Renewal of Lease—Carrying on Business on Premises—Profits—Account.*

A widow was entitled under her husband's will to the use and enjoyment of all his property during her life. It was conceded that she was entitled to the enjoyment in specie of the personal estate. The testator owned a brick-field on leasehold land, which was a going concern at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it. She put other assets of the estate into this business and extended it, and when she died it was still a going concern. At the expiration of the term of her husband's lease, she obtained a new one, covering a larger area of land :—

*Held*, that the widow, having elected to carry on the business on these premises, did so for the ultimate benefit of the estate. She was entitled to all the income, earnings, and profits derivable therefrom each year, in so far as she applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plant, stock, and belongings of the business remained on the premises or elsewhere at her death, became the property of the husband's estate.

An account against her executor was directed, and the scope of the inquiry defined.

**Statement.**

ACTION by Jane Wakefield, the widow, and the two adult children, of Henry Wakefield, deceased, a son of William Wakefield, deceased, for an account of the dealings of Mary Wakefield, deceased, the widow and executrix of the will of William Wakefield, with his estate, and for an account of the dealings of the defendant Frederick Wakefield, as executor of the will of Mary Wakefield, with the same estate, and for administration, and for an injunction. The facts are stated in the judgments.

The action was tried before MACMAHON, J., without a jury, at Toronto, on the 13th and 14th November, 1899.

*Murphy, Q.C., and R. G. Smyth*, for the plaintiffs.

*Coatsworth and F. E. Hodgins*, for the adult defendants.

*A. J. Boyd*, for the infant defendants.

December 21, 1899. MACMAHON, J.:—

Judgment.

MacMahon, J.

The plaintiff Jane Wakefield is the widow of Henry Wakefield, and the plaintiffs Rosa Wakefield and Sarah Wakefield are the daughters of the said Henry Wakefield. The defendant Frederick Wakefield is a brother, and the defendants Annie, Kate, and Florence Wakefield are infant daughters of the said Henry Wakefield.

The defendant Frederick Wakefield is the sole executor of the estate of his mother, Mary Wakefield, deceased, who died on the 23rd May, 1899, and the said Mary Wakefield was the sole executrix under the last will and testament of her husband William Wakefield, deceased, who died on the 5th January, 1882.

William Wakefield made his last will and testament on the 20th December, 1879, whereby he disposed of his estate, both real and personal, as follows:—

“First: I direct all my just and lawful debts and funeral and testamentary expenses to be paid by my executors hereinafter named as soon as may be after my decease.

“Secondly: I hereby devise and bequeath all my property, real and personal, of whatsoever nature and kind, unto my dear wife, Mary Wakefield, to be used and enjoyed by her for and during the term of her natural life and widowhood, and after her decease or marrying again, whichever shall first happen, to the following of my children: Henry, Frederick, Walter, Robert, Philip, George, Edward, Sarah, Ellen, and Mary Kate, share and share alike.

“My desire is that my eldest son, William, shall have no claim whatever upon my estate; and lastly, I hereby appoint my said wife, Mary Wakefield, and my friend Isaac Grayson, executors of this my last will and testament, hereby revoking all former wills by me made.”

Grayson renounced, and probate of the will was granted to Mary Wakefield on the 19th June, 1882.

Judgment.

MacMahon, J.

Henry Wakefield, one of the legatees and devisees under the said will, died on the 29th March, 1882, leaving him surviving the plaintiff Jane Wakefield, his widow, and her co-plaintiffs, and the infant defendants Annie, Kate, and Florence Wakefield, as his only heirs.

The plaintiff Jane Wakefield, at the time the writ issued, had applied for letters of administration to the estate of her deceased husband, which were subsequently granted, and she sues as such administratrix as well as on her own behalf, and asks for an account of the dealings of the said Mary Wakefield, deceased, as executrix of the estate of William Wakefield, with the estate of the said William Wakefield, and of the dealings of the defendant Frederick Wakefield, as executor of the estate of Mary Wakefield, with the estate of William Wakefield, from the date of her death aforesaid, and also that the estate of the said William Wakefield be duly administered in accordance with the terms of his said will. She likewise asks that an injunction be granted restraining the defendant Frederick Wakefield from disposing of or in any manner interfering with said estates, and also asks that a receiver be appointed.

On the 2nd December, 1878, William Wakefield had leased from William Washington eighteen acres of land, part of lot 35 in the township of York, for a term of five and a-half years, at \$150 a year. In this lease there is a covenant by the lessee not to make bricks or tiles on the property. On the same day Wakefield also leased from Washington two acres, part of the same lot, for a term of five years from the 30th October, 1888, at \$100 a year, "the lessee to use the premises to make bricks and tiles thereon."

William Wakefield, up to the time of his death, carried on the business of a brick and tile maker on the above-mentioned premises. The testator's real estate consisted of a house and lot on Duncan street, incumbered to the extent of \$1,500. His personal estate was sworn at

\$5,865, which included his stock-in-trade and horses used in the business, \$2,450; cash on hand and in bank, \$1,300; and the leasehold premises valued at \$750; besides the household furniture, etc. During William Wakefield's lifetime Frederick, Henry, and the other sons assisted him in the business of brick making.

Judgment.  
MacMahon, J.

Mary Wakefield, having administered, used the plant for carrying on the business of brick making on the premises on her own account, some of her sons assisting her, to whom she regularly paid wages, except to her son Frederick, who was the manager and her agent in connection with the business, and who drew from the business what was necessary for his personal requirements.

In anticipation of the leases expiring, and, as it is said, to enable her to secure other premises in the event of Washington refusing to grant fresh leases, Mary Wakefield, on the 2nd October, procured from Washington a lease for five years, commencing on the 1st May, 1884, of the twenty acres, from the whole of which she was entitled to dig clay for making brick, tiles, etc.

The business of brick making was conducted on an extended scale by Mrs. Wakefield, and she made considerable profits from the business, most of which she invested in real estate in Toronto.

Counsel for the plaintiff urged that the decision of Lord Eldon in *Howe v. Earl of Dartmouth* (1802), 7 Ves. 137, governed this case. Sir James Wigram, in *Hinves v. Hinves* (1844), 3 Hare at p. 611, referring to the rule laid down in *Howe v. Earl of Dartmouth*, said: "But, if the will expresses an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule (in *Howe v. Earl of Dartmouth*) does not apply." And in *Pickup v. Atkinson* (1846), 4 Hare at p. 628, the same learned Judge said: "If the will manifests an intention that the general residue of the estate shall be enjoyed by different

Judgment.  
MacMahon, J.

persons in succession, and there is nothing to qualify that simple intention, the Court, in order to effectuate it, converts so much of the testator's estate as is of a perishable nature (under which head leasehold property falls) into investments of a permanent kind. But if the intention of the testator appears to be, that the first taker shall enjoy the property in the state in which it exists at his death, the Court is bound to give effect to that intention."

Commenting on the above extracts from these cases, North, J., in *In re Pitcairn*, [1896] 2 Ch. at p. 206, says: "I take it, therefore, to be clear, from these and numerous other cases that the question is, what was the testator's intention, and that intention must be gathered from his will. He has the right to say what is to be done, and his intention as expressed in or to be adduced from the terms of his will, must be carried out. But, if he has given no direction on the subject, the Court applies its own rule."

To the like effect is the language of Kekewich, J., in *In re Eaton*, [1894] W. N. 95. See also *In re Bland*, [1899] 2 Ch. 336.

The case of *Groves v. Wright* (1856), 2 K. & J. 347, and the present are, I consider, on all fours, and the language used in creating the bequests is not dissimilar. In *Groves v. Wright* the testator, who was a farmer, bequeathed his farming stock and implements of husbandry and the residue of his real and personal estate to trustees (his wife—the sole executrix under his will—being one) upon trust, to permit his wife to have the full benefit and enjoyment of the same for life, and then to sell them, and divide the proceeds among his children. The widow, after the testator's death, with the assistance of her son, who was one of the trustees and a legatee in remainder, carried on the testator's farm and took additional land to farm, the lease being taken in the name of her son. On the death of the wife, it was held that the lease of the additional land, and the stock thereon, belonged to her estate,

and the stock on the original farm, to the estate of her husband.

Judgment.

MacMahon, J.

The will was proved by Elizabeth Wright, the widow and sole executrix.

In the *Groves* case the trustees were, by the terms of the will, to permit the testator's wife, his executrix, to have the full benefit and enjoyment of his farming stock and implements of husbandry for life.

The will in the case I am considering bequeathes all the testator's estate, real and personal, to his wife "to be used and enjoyed by her during the term of her natural life."

There is no indication in the will, as contended for by counsel for the plaintiff, that there should be a conversion by the executrix of the estate, and that her life estate was limited to the interest derived therefrom. On the contrary, there is in the case in hand, as there was in *Groves v. Wright*, 2 K. & J. 347, a clear intention by the testator that the widow, if she considered it for her benefit, might elect to carry on the business, and if she so elected that the business plant and other personal estate should remain in specie to be used and enjoyed by her for life. It must be noted that neither in the *Groves* case, nor in the present case, is there any direction that the business should be carried on.

Sir W. Page Wood in *Groves v. Wright*, at pp. 351-2, said: "Here, farming stock is given for the benefit of the testator's widow for life. She could not personally use it so as to consume it; the only use she could so personally make of it would be to sell it. By such a bequest, the testator must, I think, have intended that his widow should have the use of the stock, contemplating that she would carry on the business of the farm with it. She might have allowed the stock to be sold, and have taken the income of the produce for life, leaving the capital to the legatees in remainder; or if not, I must suppose that the testator contemplated that she would carry on the



Judgment.

MacMahon, J.

business; and if, in the course of such business, it was necessary that any part of the farming stock should be sold, then the substituted stock would follow the course of the original subject of the bequest. Then the difficult part of the case is this: The widow, being entitled to use this farming stock during her life for her own benefit, would of course be entitled to all the profits which she made by such use. She seems to have found the farm business profitable, and she extended it; and instead of 60 acres, I find that she occupied 240 acres. Would it be just that the fruits of her personal labour should be added to the estate of the testator, when, certainly, if she had invested it in the funds, no one could say it was not her own. So, if she had bought an estate, or if she had taken another farm a few miles off, and had applied her surplus profits in stocking it, keeping sufficient stock on the farm of the testator to carry it on as usual, all that the legatees in remainder could have claimed would have been the stock on the sixty-acre farm, and not that which had been bought with the profits made by the labour of the tenant for life, any more than they could have claimed the money if she had invested her profits in the funds. Therefore, if the two farms which the widow occupied had been separate, no difficulty would have arisen on this point. The stock on the sixty-acre farm would then have belonged to the testator's estate, and the stock on the other farm would have been her own."

On p. 354 the Vice-Chancellor says: "If the widow had simply carried on the farm, and with the surplus profits had stocked another farm, the stock on the original farm would belong to the testator's estate, and the other stock would be the widow's own. I think the same rule may be applied, and that I may make a declaration to the effect, that the widow of the testator, having carried on the farming business of the testator after his death, and having therein employed the farming stock and effects

bequeathed to her for life, and having also carried on the business on additional land which was afterwards taken in the name of John Wright, was entitled to all such farming stock and effects as, at her decease, were on the said additional farm, and would be properly attributable to, and would be fit and proper for the carrying on of the farming business upon such additional land; but that the testator's estate was entitled to all such farming stock as was on the original land, and was proper for carrying on the farming business of the testator at his death. Then there must be an inquiry what, according to this declaration, should be taken to be the farming stock of the testator and of the widow respectively, and the respective values thereof at the time of the decease of the widow."

Judgment.  
MacMahon, J.

In *Breton v. Mockett* (1878), 9 Ch. D. 95, Malins, V.-C., draws the distinction between the facts in that case and those in *Cockayne v. Harrison* (1872), L.R. 13 Eq. 432; in the latter there being a gift for life of farming stock made in connection with a gift for life of the business, the stock being necessary to carry on the business; while in the former, which was also a bequest of farming stock, there was no direction to carry on the business.

*Flockton v. Bunning* (1868), L.R. 8 Ch. 323 n., *In re Chancellor* (1884), 26 Ch. D. 42, and *Lean v. Legn* (1875), 32 L.T. N.S. 305, have no application to the present case, as in all of them there was a direction for sale and conversion.

The proper declaration to make is: That Mary Wakefield was entitled to enjoy the testator William Wakefield's estate, real and personal, in the pleadings referred to, in specie, for and during the term of her natural life or widowhood, and that she was beneficially entitled for her own use to all profits and accretions derived by her from the annual income or profits of the said estate which came to her hands, but that her estate in the hands of the defendant Frederick Wakefield is accountable for the property of the estate of the said William Wakefield, real

Judgment.  
MacMahon, J.

and personal, which came to the hands of the said Mary Wakefield or the defendant Frederick Wakefield since her decease, or the value thereof.

(2) Reference to the Master in Ordinary to take an account of the property, real and personal, of the said testator William Wakefield which has come to the hands of the deceased Mary Wakefield, or to the hands of the defendant Frederick Wakefield as her executor, and of the disposition which has been made thereof, and of what the same now consists, and what amount, if any, the estate of the said Mary Wakefield in the hands of the said defendant Frederick Wakefield is liable for to the estate of the said testator William Wakefield.

(3) Reserve further directions and costs till after report.

The plaintiffs appealed from this decision to a Divisional Court, and their appeal was heard by BOYD, C., ROBERTSON and MEREDITH, JJ., on the 21st and 22nd February, 1900, the same counsel appearing.

May 14, 1900. BOYD, C.:—

It was not on the appeal disputed, but was conceded, that the tenant for life, Mrs. Wakefield, was entitled to the enjoyment in specie of the personal estate. Upon this footing, also, all the members of the family acted during the life of the tenant for life. The testator owned a brick field on leasehold land, which was a going concern at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it, as she lawfully might: *Miller v. Miller* (1872), L.R. 13 Eq. 263, 268. She put other assets of the estate into this business, and so extended it during her life, and when she died it was still a going concern. In order to the continuance and development of the business, it became expedient to get a further lease of the same premises, and this was obtained by the life-tenant on improved terms,

paying a little more rent and getting the privilege of working a much greater area of brick land on the same premises which had been leased by the testator. His lease had some eighteen months to run at his death, and the tenant for life entered upon this possession. At the termination of her husband's term she might have chosen to end the business, but she preferred not to do so, and obtained the new lease of the same premises.

Judgment.

Boyd, C.

The law is briefly stated thus in *Bisset on Life Estates*, p. 248: "If the tenant for life renews, though not bound to renew, he will be in the same condition as if he had been bound to renew, that is, the law will not permit him to renew for his own use, but will make him a trustee for the remainderman." The cases shew that "renew" here used does not mean some right of renewal growing out of the former instrument; but, if the new lease is obtained by reason of the possession or is in any way attributable to the former lease, then it amounts to a renewal.

A very distinct case on this point is *Randall v. Russell* (1817), 3 Mer. 190, and the principle is succinctly stated in *Giddings v. Giddings* (1827), 3 Russ. at p. 258: "The remainderman will be entitled, on the principle that a lease, obtained by a tenant for life, enures for the benefit of all in remainder."

Nor is this result affected or diminished by the fact that a larger area of brick land was secured by the new lease. This was an incident of obtaining the new lease, an accessory which would go with the principal. The principle involved in this regard in *Aberdeen Town Council v. Aberdeen University* (1877), 2 App. Cas. 553, seems to be applicable to this new lease. True it is that the weight of authority is against extending the trusteeship to new properties not leased by the testator. That was the *ratio decidendi* in *Groves v. Wright*, 2 K. & J. 347, (see, *contra*, Jessel, M.R., in *Re Morgan* (1881), 18 Ch. D. at p. 103); but it does not appear to warrant my brother

Judgment.

Boyd, C.

MacMahon in extending exemption to the additional business done on this brick land under the new lease, which was conterminous with the lease held by the testator.

The widow, having elected to carry on the business on these premises, did so for the ultimate benefit of the estate of her husband, though she is entitled to all the income, earnings, and profits derivable therefrom each year, in so far as she has applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages. Whatever profits, however, went into the business to increase it, and whatever plant, stock, and belongings of the business remained on the premises or elsewhere at the date of her death, became the property of her husband's estate—her life tenancy therein having ended. See *Cockayne v. Harrison*, L.R. 13 Eq. 432; *Re Evans* (1887), 34 Ch. D. at p. 601; *Skirving v. Williams* (1857), 24 Beav. at p. 282; *Green v. Britten* (1863), 1 De G. J. & S. at p. 655 (L. J. Turner); *Thursby v. Thursby* (1875), L.R. 19 Eq. at p. 415; *Bryant v. Easterson* (1859), 5 Jur. N.S. 166.

There is to be no account of any profits taken or expended by the life-tenant apart from the business and on other places and properties. But she is to account for moneys and like assets of the testator's estate which she put into this business: these will have to be returned to the husband's estate, for she was only entitled to the interest or increase of these sums, and not to the capital: *Thorpe v. Shillington* (1868), 15 Gr. 85.

The account directed in the judgment under consideration should be varied or modified so as to introduce the element of inquiry before the Master above referred to, and not already embraced therein. It is a great pity that the parties cannot settle upon a fixed sum to be paid to the appellants and save much expense in administration. No costs of appeal.

Memorandum to frame amended judgment.

Judgment.

Boyd, C.

1. The extent and value of the assets should be ascertained at death of testator so as to shew what clear amount in value was left after payment of debts, &c., of which the life-tenancy was to be enjoyed by the widow.

2. That is the first measure of liability, as if an inventory had been taken, on the footing of which the life-tenant would be accountable upon the determination of her estate.

3. Then the leasehold property having been renewed by her, and the same business carried on of brick making as was carried on by the testator, though more extensively, she as life-tenant is entitled to all the yearly income and profits therefrom; but her estate is accountable for the state of the business as it existed at her death, which would be reckoned as the continuation of the testator's business, and so part of his estate to be enjoyed by the remaindermen *pari passu*—with this deduction, that the value of the estate as it came first to the tenant for life should be deducted, so that she may not be twice chargeable with the same amount. All just allowances to be made by Master.

ROBERTSON, J.:—

I concur with the Chancellor.

MEREDITH, J.:—

If this case is to be determined according to the true interpretation of the will in question, I am of opinion that the rule requiring a conversion of wasting assets, which was applied in the case of *Howe v. Earl of Dartmouth*, 7 Ves. 137, was applicable to it, and that the executrix should have acted in accordance with that rule.

The case is clearly not one of a specific, as distinguished from a general, gift for life. It is very like the case of *Howe v. Earl of Dartmouth* in this respect. In each

Judgment,  
Meredith, J.

there was the gift for life of the residue of the testator's estate, after payment of his debts funeral and testamentary expenses; portions of the estate being of a wasting character.

Then, although, strictly speaking, the gift is general and not specific, is there anything in the will shewing that the testator intended the life-tenant to have the property in the state in which he left it; or that there was not to be a conversion according to the rule? If so, of course the widow had the right to the use and enjoyment of it in specie, for it is the testator's will to which effect is to be given.

Upon this question "the rule of law is, that unless there can be gathered from the whole will some expression of intention that the property is to be enjoyed in specie, the rule in *Howe v. Earl of Dartmouth* is to prevail. It is therefore incumbent on the persons contesting the application of that rule, and on the Court which forbids that application, to point out the words in the will which exclude it, and if this cannot be done the rule must apply:" *Macdonald v. Irvine* (1876), 8 Ch. D. 101, at p. 121; and *Morgan v. Morgan* (1851), 14 Beav. 72, at p. 82.

What is there in the will in question which answers the requirements of this rule? Nothing whatever but the words "used and enjoyed." I can see nothing in those words, having regard to the nature and effect of the rule and the purpose for which it is applied, inconsistent with a conversion of the property as the other rule requires.

It could be just as much "used and enjoyed" in its converted state as in specie, whilst, if it were not converted, that part which would waste in the widow's lifetime could not go to the children, who were to take the same property after their mother's death or marrying again.

No case cited, nor any that I have been able to find, gives countenance to the contention that the rule should be here excluded. *In re Bland*, [1899] 2 Ch. 336, is not in point. That was the case of an absolute gift to the widow,

followed by a gift over in the event of her dying without issue.

Judgment.

Meredith, J.

The learned trial Judge appears to have thought the case of *Groves v. Wright*, 2 K. & J. 347, "on all fours" with this case, upon this point as well as in other respects. But, though the words "full use, benefit, and enjoyment" were employed in the will in that case, I cannot think those words affected in any degree this question. The crucial words in that case were "*after the death or marriage of my said wife . . . to convert into money*" the property *thereinbefore* devised. Clearly excluding the rule which requires a conversion at once.

The words "use and enjoyment" were also used in the will in question in *Pickering v. Pickering* (1839), 4 M. & Cr. 289: yet no one seems to have suggested that they had any bearing upon this question.

Then, the rule applying, the case becomes a simple one: the tenant for life was entitled to interest only, upon the value of the property which she ought to have converted, and her estate is accountable for it, and the profits arising from the business: see *In re Hill, Hill v. Hill* (1881), 50 L.J.N.S. Ch. 551.

But it is said that the case ought to be treated as if the widow was not bound to convert, because the defendants contend for that, and Mr. Smyth, of counsel for the plaintiff, conceded it, and, what is more important, the notice of this motion expressly asks it, although the last words of Mr. Smyth's contention at the trial were that there should have been a conversion, and that the rule applied in *Howe v. Earl of Dartmouth* ought to be applied, and the accounts taken accordingly.

Henry Wakefield died only a little more than a year after his father, so it can hardly be said that he was a consenting party to the neglect of the executrix to convert; and some of his children are yet infants. The case, in this respect, is very different from the case of *Pickering v. Pickering*, 4 M. & Cr. 289.



Judgment.

Meredith, J.

If, then, the case is to be dealt with upon this footing, it likewise presents no great difficulties.

The estate of the executrix must account for the property of her testator come to her hands. She was entitled to it for life only. At her death it should go to the remaindermen. Part of that property was the testator's business. At her death they became entitled to that, and they must have it in its then condition. If the life-tenant chose to carry into it the profits, instead of taking them out and applying them to her own use, as she might have done, and to enlarge and increase the business, that cannot prevent it going to the remaindermen. There is no means of severance: it is all mixed: all a part of that same business to which under the will they are entitled.

I do not perceive how anything turns upon any question of constructive trust in renewing the lease: that was simply part of the business. If it were not, as life-tenant the widow was entitled, trust or no trust, to the benefit of the renewals during her lifetime, and there is nothing in them beyond that.

Apart from what went into the business, the accounting is simple: and, as to the business and any part of the estate that went into it, the accounting is also simple: the remaindermen get it.

As to the costs: there seems to me to have been no good reason for bringing this action; the plaintiffs ought to have taken the usual summary order for administration, and all questions would have arisen first in the Master's office. I would, therefore, allow costs out of the estate as usual, by way of commission only, with the addition of the costs as of one appeal only from the Master's report.

E. B. R.

## [DIVISIONAL COURT.]

## TUFTS V. PONESS.

*Sale of Goods—Non-acceptance—Contract—Tender—Waiver—Damages—Price of Goods—Property not Passing—Possession—Judgment—Payment into Court.*

On the 30th May, 1899, the plaintiff and defendant agreed in writing for the sale by the former to the latter of certain goods for \$175, payable \$30 on receipt of bill of lading for or tender of the goods, and the balance to be paid in instalments, for which promissory notes were to be given; the property to remain in the plaintiff until payment of the notes, but the goods to be shipped as soon as possible, freight and charges to be paid by the defendant. On the 6th June the plaintiff sent the defendant an invoice of the goods, and on the 14th of that month the defendant wrote to the plaintiff refusing to proceed with the contract upon the ground that the invoice price was not that agreed upon. On the 15th June the plaintiff advised the defendant that the goods had been shipped and drafts and notes forwarded. Some correspondence ensued, but the defendant adhered to his refusal to take the goods. The goods arrived at the town where the defendant lived on the 10th July, and the defendant on the 20th July again wrote to the plaintiff that he had supposed that the plaintiff had concluded not to ship the goods, and again refused to take them, giving as a ground that the season for use of them had passed, and saying that they were now at the station at the plaintiff's risk:—

*Held*, that the defendant having refused to perform his contract on the 15th June, at which date he did not contend that there had been default on the plaintiff's part, and his refusal remaining unretracted down to the time of the arrival of the goods in July, his right to require tender at the date fixed for the performance was waived.

*Held*, also, that the plaintiff was entitled to recover the full price of the goods as damages for breach of the contract, upon the ground that the right to the possession of the goods having been transferred by the plaintiff to the defendant, the plaintiff had done all that he was required by the contract to do to entitle himself to payment of the price. The stipulation by which the property in the goods was to remain in the plaintiff during the term of credit, notwithstanding the delivery of possession to the defendant, and the fact that the plaintiff had given up possession to the defendant, as far as he could, took the case out of the general rule which prevents a vendor from recovering the price where he has not parted with the property in the goods.

*Held*, further, that the defendant should be allowed to pay the amount of the judgment and costs against him into Court, to be paid out to the plaintiff upon his shewing that the defendant could still obtain possession of the goods.

The defendant, on the 30th May, 1899, agreed in writing with the plaintiff to buy from him, and the plaintiff agreed to sell to the defendant, a soda water apparatus, with tumbler-holders, tumblers, and pipe, for \$175, pay-

Statement.

## Statement.

able \$30 on receipt of bill of lading for or tender of goods, and the balance by monthly instalments of \$15; the property to remain in the plaintiff until payment of promissory notes to be given for the instalments; to be shipped as soon as possible by B. & M. on West Shore, care Grand Trunk; freight and charges to be paid by consignee; papers to be sent for collection to the Merchants Bank of Canada, Windsor.

The plaintiff carried on business at Boston, Mass., and the defendant at Windsor, Ontario, and the contract was made at Windsor by one of the plaintiff's agents.

Upon the 6th June, 1899, the plaintiff sent the defendant an invoice of the goods—"an invoice of soda water apparatus shipped and consigned as per bill of lading." There was no bill of lading sent then, but a memorandum that the plaintiff had forwarded "one box glass tumblers via West Shore, care G. T. R." On the 15th June a further notice was sent to the defendant that the goods had been shipped as directed, and that a draft for \$30 and notes for the balance had been forwarded.

On the 14th June, 1899, the defendant wrote to the plaintiff refusing to proceed with the contract, upon the ground that the agent had promised to lay it down at Windsor for \$195 complete, and to furnish generators with it. He said he was willing to stick to the bargain he had made, but not to buy generators in addition to what the contract specified. Some correspondence ensued, but the defendant adhered to his refusal to perform the contract or take the goods.

The goods were shipped by the plaintiff to the defendant on the 29th June, and arrived at Windsor on the 10th July, 1899; and the defendant, on the 20th July, again wrote to the plaintiff that he had supposed that the plaintiff had concluded not to ship the goods, and again refusing to take them, giving as a ground that the season was so far advanced that he could make no use of them, and

stating that the goods were at the railway station, Windsor, at the plaintiff's risk.

Statement.

This action was then brought by the plaintiff in the County Court of the county of Essex to recover the price of the goods as damages for the defendant's refusal.

The defendant set up the delay in the arrival of the goods, and various alleged agreements on the part of the plaintiff's agent, none of which appeared in the written contract, and all of which were denied by the agent upon the trial.

Judgment was given by the Judge of the County Court in favour of the plaintiff for \$175, the contract price, with interest from the 10th July, 1899.

The defendant appealed, and his appeal was heard by a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 6th June, 1900.

*F. E. Hodgins*, for the defendant. There never was any tender of the bill of lading nor of the goods, and the delivery was not made within a reasonable time: *Barber v. Taylor* (1839), 5 M. & W. 527; *Sanders v. Maclean* (1883), 11 Q.B.D. 327, 341; *Leather-Cloth Co. v. Hieronimus* (1875), L.R. 10 Q.B. 140; *Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q.B.D. 670; *Leake on Contracts*, 3rd ed., pp. 11, 23; *Brogden v. Metropolitan R.W. Co.* (1877), 2 App. Cas. 666, 691; *Dalrymple v. Scott* (1892), 19 A.R. 477. The plaintiff gave no evidence to shew what damages he sustained, and the full price of the goods cannot be the proper measure in an action for non-acceptance: *Benjamin on Sales*, 7th ed., p. 784-5; *Sawyer v. Baskerville* (1891), 10 Man. L.R. 652; *Royal Victoria Life Ins. Co. v. Richards* (1900), 31 O.R. 483; *Mayne on Damages*, 6th ed., pp. 179, 180, 213; *Lever v. Dunkirk Colliery Co.* (1881), 43 LT.N.S. 706; *Maclean v. Dunn* (1828), 4 Bing. 722.

*F. A. Anglin*, for the plaintiff. We have not to shew a performance, a tender or delivery; that has been

**Argument.** rendered unnecessary by the defendant's continuous refusal to accept the goods: *Ripley v. McClure* (1849), 4 Ex. 345. But we did comply sufficiently with what the contract provided. There was no other criterion of damages on the evidence than the value of the goods. They are available to the defendant in the hands of the common carrier. See the recent case of *Waterous Engine Works Co. v. Pratt* (1899), 30 O.R. 541.

*Hodgins*, in reply.

July 9, 1900. The judgment of the Court was delivered by

STREET, J.:—

In my opinion the plaintiff was entitled to recover damages from the defendant for breach of his contract and all the defences set up to the action failed. The defendant refused to perform his contract on the 14th June, 1899, at which date he did not contend that there had been default on the plaintiff's part, and his refusal remained unretracted down to the time of the arrival of the goods in July, and his right to require tender at the date fixed for the performance was waived: *Ripley v. McClure* (1849), 4 Ex. 345: Benjamin on Sales, 7th Am. ed., p. 789.

I am of opinion, further, that the plaintiff is entitled, under the circumstances, to recover the full price of the goods, upon the ground that the right to the possession of the goods having been transferred by the plaintiff to the defendant, the plaintiff has done all that he was required by the contract to do to entitle himself to payment of the price. He shipped the goods to the defendant direct, and they were (and, for all that appears to the contrary, still are) ready for the defendant at the railway freight house in Windsor, had he chosen to take them. The plaintiff had put them out of his own control and under the control of the defendant. The stipulation in

the contract by which the property in the goods was to remain in the plaintiff during the term of credit, notwithstanding the delivery of possession to the defendant, and the fact that the plaintiff has given up possession to the defendant, so far as he can, take the case out of the general rule which prevents a vendor from recovering the price where he has not parted with the property in the goods.

The judgment, therefore, for the purchase money, \$175, and interest and costs, as directed by the County Judge, should not be disturbed; but the defendant may if he choose pay the amount of the judgment and costs into Court, to be paid out to the plaintiff upon his shewing that the defendant is still in a position to obtain possession of the goods contracted for. The defendant should pay the costs of the appeal forthwith after taxation.

E.B.B.

## [DIVISIONAL COURT.]

## PLESTER V. GRAND TRUNK R. W. Co.

*Railways—Farm Crossing—51 Vict. ch. 29, sec. 191 (D.)—“Farm Purposes”—Injury to Stranger—Duty—51 Vict. ch. 29, sec. 289 (D.)*

The defendants having, in compliance with the requirements of sec. 191 of the Railway Act of Canada, 51 Vict. ch. 29, made, and assumed the duty of keeping in repair, a crossing over their railway where it crossed a certain farm, nevertheless allowed it to get into an unsafe and defective condition whereby a horse of the plaintiff was injured. The plaintiff was at the time using the horse, with the permission of the owner of the farm, in hauling gravel from a part of the farm to the highway, for which purpose it was necessary to cross the railway:—*Held*, without deciding whether the right of user of such a crossing is limited to a user for farm purposes, but assuming it to be so limited, that the hauling of gravel was, under the circumstances, a farm purpose, and that the defendants owed a duty, even apart from sec. 289, towards one using the crossing by invitation of the owner.

AN appeal by the defendants from the judgment of the junior Judge of the County Court of Wellington in favour of the plaintiff in an action to recover damages for

Judgment.  
Street, J.

Statement.

**Statement.** injury to a horse of the plaintiff by reason of a defect in a farm-crossing over the defendants' railway, where it severed the farm of one Laird. The plaintiff was using the horse in hauling, with the permission of Laird, gravel from Laird's farm to the highway, for which purpose it was necessary to cross the railway.

The appeal was heard by a Divisional Court composed of MEREDITH, C. J., and FALCONBRIDGE, J., on the 6th April, 1900.

Wallace Nesbitt, Q.C., for the defendants. The crossing was constructed by the defendants under sec. 191 of the Railway Act, 1888. The Judge below relied on *United Land Co. v. Great Eastern R. W. Co.* (1873), L.R. 17 Eq. 158, but I submit that he has misapprehended that case. I refer to *Collinson v. Newcastle and Darlington R. W. Co.* (1844), 1 C. & K. 546. The relation is that of a servient tenement, and the user is to be regulated by the contract. The Court is bound to invoke the heading "Farm Crossings," which is placed on the statute book just before sec. 191: Gale on Easements, 7th ed., p. 317; *Wademan v. Albany and Susquehanna R.R. Co.* (1873), 51 N.Y. 568; *Midland R. W. Co. v. Gribble*, [1895] 2 Ch. at p. 833; *McAlpine v. Grand Trunk R. W. Co.* (1876), 38 U.C.R. 446; *Mann v. Chicago, Rock Island, and Pacific R. W. Co.* (1885), 86 Mo. 347. The plaintiff was not using the crossing for farm purposes, and he was only a licensee, to whom the defendants owed no duty.

*Buckingham*, for the plaintiff, relied on *United Land Co. v. Great Eastern R. W. Co.*, L. R. 17 Eq. 158; *Auger v. Ontario, Simcoe, and Huron R. W. Co.* (1858), 16 U.C. R. 92; *Gillis v. Great Western R. W. Co.* (1855), 12 U.C.R. 427; *Wilson v. Northern R. W. Co.* (1869), 28 U.C.R. 274; *Kilmer v. Great Western R. W. Co.* (1874), 35 U.C.R. 595; *Stewart v. Cincinnati, etc., R. W. Co.* (1890), 80 Mich. 166; 42 Am. & Eng. R.R. Cas. 101; *Indermaur v. Dames* (1866), L.R. 1 C.P. 274.

*Nesbitt*, in reply, cited *Grand Trunk R. W. Co. v. Huard* (1892), Q.O.R. 1 Q.B. 501; *Vezina v. The Queen* (1889), 17 S.C.R. at pp. 21, 22. Argument.

July 18, 1900. The judgment of the Court was delivered by

MEREDITH, C.J. :—

Appeal from the County Court of the county of Wellington.

John Laird is the owner of lot 7 in the 3rd concession, division C., in the township of Guelph, which is crossed by the railway of the appellants, and a crossing exists over the railway connecting the severed portion of the lot with the remainder of it.

The crossing was made by the appellants in compliance with the requirements of the Railway Act (51 Vict. ch. 29, sec. 191 (D.)), and it is a proper inference from the facts appearing in the statement of the case that they had assumed the duty of keeping it in repair.

There is a bed of gravel on the severed portion of the lot, and for three or four years before the accident to the plaintiff's horse in respect of which the action was brought, Laird had been in the habit of selling the gravel to the municipal authorities of the township and others, who hauled it away in vehicles of their own or vehicles hired for the purpose.

The respondent and a man named Hill were in the spring of 1899 employed by the municipal authorities to haul from Laird's gravel pit a quantity of gravel which they had purchased from Laird on the agreement that it was to be hauled away by them.

The only way by which the gravel could be brought to the highway was over the crossing referred to, and from thence over the intervening land of Laird between the crossing and the highway.



Judgment.

Meredith, C.J.

While the respondent, with the knowledge and assent of Laird, was engaged in hauling a load of the gravel so purchased by the municipal authorities over the crossing, one of the horses used in the work was injured owing to the defective and unsafe condition of the crossing, and to recover damages for this injury the action was brought.

It was held in the Court below that the appellants were liable to the respondent for the damage thus sustained, and judgment was accordingly given for the respondent against the appellants for \$75, with costs, and from that judgment the appellants have brought this appeal.

Upon the argument before us it was not suggested that the duty of maintaining the crossing and keeping it in repair did not rest upon the appellants, but it was contended that the use to which the crossing was being put was not one for which it was required to be or was provided, which was, it was urged, limited to farming purposes, and that in any case there was no liability to the respondent, towards whom, it was contended, the appellants owed no duty as to the crossing.

It is unnecessary, in our opinion, to decide whether the right of user to which the owner of land is entitled in respect of the crossing made for him under sec. 191 is limited to a user for farm purposes only, for, assuming it to be so limited, we think that the hauling of gravel, in the circumstances of this case, may not unfairly be said to be a farm purpose. Laird was not engaged in the business of digging and selling gravel, but his business was that of a farmer, and the gravel was being dealt with by him in the course of that business and as a product of his farm, as is often done by farmers having gravel deposits on their lands. In no reasonable view can it be said that the farm in this dealing with the gravel upon it was being used for other than farm purposes. I am not disposed to put upon the section a narrow construction, having in view the number of matters with which in this country a farmer deals which in some sense may be said to be outside of

what is ordinarily understood by the term "farm purposes," —such, for instance, as the sale of standing timber, or timber cut from the farm. Judgment.  
Meredith, C.J.

The second objection is also, in my opinion, not well founded. To decide as we are asked by the appellants to do, would, I think, very much impair the usefulness to the owner of the land of the crossing which the railway company is required to provide, and I see no reason why a person lawfully using a crossing in the circumstances in which the crossing in question was being used by the respondent may not recover if in doing so he or his property is injured owing to the neglect of the railway company to discharge its statutory duty in respect of the crossing.

It may be conceded that the persons whom the legislature had primarily in view in enacting sec. 191 were the owners of the lands through which the railway was carried, but it cannot be that no duty is owed by the railway company towards the members of the family of the owner or his servants, nor is it reasonable to suppose that there is no duty towards one using the crossing by the invitation of the owner, and in the carrying out of an arrangement with him which renders it necessary that the crossing should be used for hauling away a product of the farm by the purchaser of it from the owner or by the servants or agents of the purchaser.

The liability of the appellants may, I think, be supported apart from the provisions of sec. 289, but that section, I think, makes clear the right of the respondent to recover as against the objection I am now considering. The appellants have omitted to perform their statutory duty under sec. 191, and the respondent is a "person injured thereby," and the appellant is therefore "liable to him for the full amount of damages sustained" by the omission.

The appeal should, in my opinion, be dismissed, and the judgment appealed against affirmed, with costs.

E. B. B.

## HERMAN V. WILSON ET AL.

*Action — Company — Wages — “Labourers, Servants or Apprentices” — Director’s liability—R.S.O. (1897), ch. 197, sec. 8—Motion to dismiss—Con. Rule 616.*

The plaintiff, the manager of a mining company, paid out of his own moneys the amount due for wages by the company to certain labourers, and having obtained assignments of their claims, recovered a judgment against the company for the amount together with a sum of money owed to him by the company for services. After an execution against the company had been returned unsatisfied, he brought this action on behalf of himself and the labourers against two of the directors under section 8 of R.S.O. (1897), ch. 197, the Ontario Mining Companies Corporation Act, to make them personally liable for the amount due on the execution :—

*Held*, that the action brought against the company was not such a one as is contemplated under the section, and there being no dispute as to the facts, this action was dismissed on a motion under Consolidated Rule 616.

The manager of a mining company is not a “servant, labourer or apprentice” within the meaning of section 8.

## Statement.

THIS was a motion under Con. Rule No. 616 to dismiss an action which was brought by the plaintiff who was manager of a mining company, against the defendants who were directors of the company under the circumstances set out in the judgment.

The motion was made in weekly court and was argued on June 19th and 20th before FERGUSON, J.

## Argument.

*C. C. Robinson*, for the motion. The action is brought under the provision in “The Ontario Mining Companies Incorporation Act,” R.S.O. (1897), ch. 197, sec. 8, but is wrongly constituted. The action provided for in that section is not a class action and the plaintiff cannot sue on behalf of himself and others of a class even if he was one of a class: Con. Rule 200. He cannot sue as an assignee of labourers’ claims, and he cannot sue as a labourer or servant himself as he was a manager and the word “servant” has a limited meaning. The object of the enactment was to benefit servants strictly so called. The facts are so plain that it would be useless to go to trial and

the action should be dismissed on this motion: Con. Rule 616. I refer to *Holmested and Langton*, 341 note, and 771; *Welch v. Ellis* (1895), 22 A.R. 255 at p. 259; *Rogers v. Wilson* (1887), 12 P.R. 322, and (1888), *ibid.* 545.

Argument.

*W. J. Elliott*, contra. The plaintiff is entitled to recover as the assignee of the labourers' claims, and, as a matter of fact, is a labourer himself, having performed manual labour; and the statute should be liberally interpreted in aid of just claims. This motion should not be granted in any but the plainest of cases, not where there is a contest, as here. I refer to *Cook v. Lemieux* (1885), 10 P.R. 577; *Henebery v. Turner* (1883), 2 O.R. 284; *Chilton v. Corporation of London* (1878), 7 Ch. D. 735; *Gilbert v. Smith* (1876), 2 Ch. D. at p. 689.

*Robinson*, in reply.

July 10th, 1900. FERGUSON, J.:—

The action is brought against Wilson and Carpenter, two of the directors of the Mandarin Gold Mining Company of Ontario. It is professedly brought under the provisions of section 8 of chapter 197, R.S.O., (1897).

The plaintiff sues as he says in his pleading on behalf of himself and eleven other persons, the total claim being \$465.45, with interest thereon.

It seems not to be disputed that these eleven others were labourers or servants of the company, but it is denied that the plaintiff was such labourer or servant.

The section provides amongst other things that no director shall be liable to an action for a debt to a labourer, servant or apprentice of the company unless the company has been sued therefor within one year after the debt became due, nor before an execution against the company has been returned unsatisfied in whole or in part; and that the amount due on such execution shall be the amount recoverable with costs against the directors.

No one of these eleven others brought any action against the company to recover the amount if anything

Judgment.  
Ferguson, J.

due to him from the company, but the plaintiff says and shows by his pleading that he brought an action against the company in which he claimed sums equal to the respective amounts that he says is owing to each of the other eleven persons, together with a sum of \$75 for himself. That action was appealed to the Court of Appeal and an order was made by that Court for the payment by the company to the plaintiff of the sum of \$557.08. On this there was judgment and execution which was returned by the sheriff unsatisfied as to the whole amount thereof, and the plaintiff now seeks to say and maintain that such action brought by him and the return made by the sheriff constitute a fulfilment of this requirement of the section, in this particular regard.

It appears both by the pleadings in the former action brought by the plaintiff against the company and the examination of plaintiff that that action was for moneys expended by the plaintiff for the company in payment of wages and other services and for material, horse hire, etc. The recovery in that action was for \$557.08, and the plaintiff says that the various sums in respect of which he seeks to recover in this action are included in that sum, in respect of which there has been a return by the sheriff unsatisfied as to the whole amount.

That action was plainly not for a debt or debts owing to labourers or servants of the company, but for money paid by the plaintiff for the company at the company's request. In the plaintiff's examination he says it was for sums paid by him to various men employed by him and to various merchants and others for goods supplied and for hire of horses, or in connection with the work.

It appears that the plaintiff was, in a way, manager of the company's work in sinking a shaft for the purpose of testing a supposed mine.

I fail to see that the action brought by the plaintiff against the company was such an action as was contemplated by and provided for in this section 8, or how, in

the circumstances, one can apply in this action the provision that the amount due on the execution shall be the amount recoverable, etc., and I do not see that the plaintiff's now asserting that he is the assignee of the amounts said to be owing to each of the other eleven persons can help his position. He does not make this statement in his pleading.

Judgment.

Ferguson, J.

I think this action must be considered as if no action had been brought against the company.

As to the plaintiff's own claim for wages he states it at \$75 in the action against the company and at \$50 in the present action. I do not see how the provisions of this section can be made applicable to it especially in regard to the amount to be recovered. Besides, after perusing the statement of claim in the action against the company, the statement of claim in this present action, the examination of the defendants and reading the case *Welch v. Ellis* (1895), 22 A.R. 255, and some other cases, I am of the opinion that the plaintiff was not a labourer, servant or apprentice of the company within the meaning of this section 8.

There seems to me to be an insuperable barrier against the plaintiff's recovery in this action. There is no dispute as to the actual facts. I think it a plain case. The barrier appears by the plaintiff's own admissions and statements. I am aware that in a doubtful case, I should refrain from making an order, but whether I am right or not, I do not, in fact, entertain any doubt. On the plaintiff's own showing as above there should be an order dismissing the action, and I think the dismissal should be with costs.

*Order accordingly.*

NOTE.—There were many other contentions on the part of the defence, but I have not thought it needful to consider them.

G. A. B.

THE CORPORATION OF THE TOWNSHIP OF ALDBOROUGH  
V. SCHMELTZ.

*Municipal Corporations—Bonus By-law—Scrutiny—Costs—Successful Party—Jurisdiction—R.S.O. ch. 223, sec. 372.*

Under sec. 372 of the Municipal Act, R.S.O. ch. 223, a County Court Judge, on a scrutiny of the ballot papers cast on the voting for a bonus by-law, cannot award costs against the corporation if it be successful in upholding the by-law.

Statement.

THIS was a motion for an injunction, restraining the defendants, of whom one was George Schmeltz and the other the Sheriff of the County of Elgin, from taking any action towards enforcing a writ of *fieri facias* issued out of the County Court of the said county against the goods and lands of the plaintiffs to recover the sum of \$514.64, being the costs ordered to be paid by the plaintiffs by the judge of the County Court in an order of February 22nd, 1900, made under the following circumstances :

The Township of Aldborough on June 30th, 1899, submitted to the ratepayers of a portion of the township, pursuant to statute a by-law to grant a bonus in aid of the Lake Erie and Detroit River Railway Company. Pursuant to section 366 (2) of the Municipal Act, R.S.O. c. 223, the clerk of the Township certified that the majority of the votes cast were in favour of the by-law and that as far as shown by the voters list and assessment roll such majority appeared to be one-third of the ratepayers entitled to vote. Thereupon an application was made before the County Judge of the County of Elgin to appoint a day and place for entering into a scrutiny under section 369 of the Act, of the votes cast for and against the said by-law, and an order was made accordingly on July 13th, 1899.

On February 27th, 1900, the County Court Judge certified the result of his scrutiny whereby he found that there had been cast in favour of the by-law more

Statement.

than one-third of the number of ballots of those entitled to vote thereon as required by section 366. Nevertheless he directed that the corporation of the Township of Aldborough should pay the costs of all parties in connection with the scrutiny which he fixed (the same having been previously taxed) at \$514.64. He, moreover, attached a memorandum to the certificate for the information of the plaintiffs' council wherein he complained that great difficulties had been cast in his way in proceeding with the scrutiny, by reason of an incomplete assessment roll and an incorrect set of voters lists founded not on the assessment roll as they should have been but on the electoral and municipal voters list prepared under the Voters List Act, and by reason of other matters blameable upon the officers of the corporation; and he added: "I have ordered the costs of the proceeding to be paid by the municipality of the Township of Aldborough because that corporation is responsible for the acts and neglects of its officers which duty cast upon them and which the legislature enjoins."

Pursuant to the certificate of February 22nd, 1900, the writ of *feri facias* above mentioned was issued, proceedings upon which it was now sought to enjoin.

The motion was argued on May 22nd, 1900, before ROSE, J.

*W. R. Riddell, Q.C.*, for the motion, contended that as the judge did not apportion the costs, the only power he had was to award them according to the result of the application: R.S.O. c. 223, secs. 372, 378 (1); and that he had no power to award costs against the successful party: *In re Pattullo and The Corporation of the Town of Orangeville* (1899), 31 O.R. 192; *Fleming v. The Corporation of the City of Toronto*, (1892), 19 A.R. 318; *In re Workman and The Corporation of the Town of Lindsay* (1885), 7 O.R. 425; *Darby v. Corporation of the City of*



**Argument.** *Toronto* (1889), 17 O.R. 554; *Re Davis v. The City of Toronto* (1891), 21 O.R. 243; *Dicks v. Yates* (1881), 18 Ch. D. 76.

*Glenn, Q.C., as amicus curiæ contra.*

ROSE, J. :—The power of the judge in respect of costs is to be found in R.S.O. ch. 223, secs. 372, 378. There has been no apportionment of costs here,—but there has been a success and the successful party has been ordered to pay the costs. Fairly read the sections mean that costs are to be given according and not contrary to the result. The only discretion the judge had was a judicial discretion to award costs according to the result. Apart from authority the point seems clear. I have, however, been referred to *In re Pattullo and The Corporation of the Town of Orangeville*, 31 O.R. 192; *Fleming v. The City of Toronto*, 19 A.R. 318; *Dicks v. Yates*, 18 Ch.D. 76. The motion must succeed. Injunction continued to the hearing; costs to the applicant in any event of the cause, but the matter may be spoken to again on the question of costs.

A. H. F. L.

## ONTARIO BANK V. ROUTHIER ET AL.

*Set-Off—Bank Deposit—Depositor's Promissory Note—Ranking on Insolvent Estate of Deceased Maker.*

A testator having a deposit to his credit in a bank at the time of his death, was indebted to the bank on a note under discount, which had not then matured. The deposit remained with the bank until after the maturity of the note, when the bank brought an action on it against the executors of his insolvent estate, who claimed that the bank should rank on the estate for the full amount of the note and give credit upon the dividend for the amount of the deposit:—

*Held*, that the deposit not having been withdrawn or demanded before the maturity of the note, the bank was entitled to set off the debt on the note against the deposit, and to rank for the balance.

THIS was an action by the holders of a promissory note for \$1000, against the executors of the maker, tried at Ottawa on June 4th, 1900, before Meredith, C.J., without a jury.

Statement.

Judgment was reserved on the question whether the plaintiffs were entitled to deduct the amount of a deposit with them to the credit of the defendant's testator when he died from the amount of the note, which did not mature until after his death, and to recover judgment for the balance, there being a deficiency of assets in his estate. The facts are stated in the judgment.

*William Wyld* and *Glyn Osler*, for the plaintiffs.

*Belcourt, Q.C.*, and *J. A. Ritchie* for the defendants.

The following cases were cited and references made: *Willis on Negotiable Instruments*, pp. 169-170; *Moffat v. Foley* (1867), 26 U.C.R. 509; Statutes of Set-Off, 2 Geo. II., ch. 22; 8 Geo. II., ch. 24; R.S.O. (1897) ch. 147, sec. 26; *Johnston v. Burns* (1893), 23 O.R. 179, 582; *Stephens v. Boisseau* (1896), 23 A.R. 230; *Thibaudeau v. Garland* (1896), 27 O.R. 391; R.S.O. (1897), ch. 129, sec. 34.

Judgment.

June 20, 1900. MEREDITH, C.J. :—

Meredith, C.J.

I disposed of all the questions raised, save one, at the close of the argument.

The question reserved arises upon this state of facts: The defendant's testator was indebted to the plaintiffs in the amount of the promissory note sued on which had not matured at the time of his death, and he had then at his credit in the plaintiffs' branch bank at Ottawa a sum of \$134. The assets are insufficient to pay the debts of the testator in the full.

On this state of facts the claim of the plaintiffs is that they are entitled to deduct from the amount of the promissory note sued on the amount at the credit of the deceased, and to rank on the estate for and to receive a dividend on the balance, but the defendants contend that the plaintiffs must rank on the estate for the full amount of the promissory note, and must give credit upon the dividend for the amount at the credit of the testator at the time of his death.

In my opinion the plaintiffs' contention is entitled to prevail. It may be conceded that had the executors made a demand upon the plaintiffs for payment of the balance at the credit of the testator at any time before the promissory note became due, the plaintiffs would have had no answer to that demand, but that course was not taken, and it does not admit of doubt that had there not been a deficiency of assets and the executors had sued for this balance after the promissory note became due, the plaintiffs might have pleaded the promissory note as a set-off and recovered the residue of their claim in the action.

I do not see why in proving against the estate they are not entitled to be in the same position, nor do I see that the fact that there is a deficiency of assets should alter what would otherwise have been their rights in this respect.

The justice of the case is with the plaintiffs, and there is no equity that I can discover in the other creditors to insist that the debt due by the plaintiffs to the testator should be treated as vested in the executors in trust for all the creditors as from the death of the testator so as to exclude the right of set-off by the plaintiff.

*Judgment.*  
Meredith, C.J.

It follows from this conclusion that the amount paid into Court is not sufficient to satisfy the ratable share of the estate to which the plaintiffs are entitled, and there must, therefore, be judgment for them for an amount calculated upon the basis I have indicated as the correct basis for the computation of their claim, to be recovered *de bonis propriis*.

I make no order as to costs, the plaintiffs having failed in part and succeeded in part only.

G. A. B.

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RE McCARTEE

AND

THE CORPORATION OF THE TOWNSHIP OF MULMUR.

*Intoxicating Liquors—Liquor License Act—Local Option By-law—Omission to name Deputy Returning Officers in.*

When a by-law requires the assent of the electors, the deputy returning officers to take their votes must be named therein, and a by-law passed under sec. 141 of the Liquor License Act, R.S.O. (1897), ch. 245, which omitted their names was quashed.

THIS was a motion to quash a by-law of a municipal corporation on the grounds set out in the judgment. The motion was argued in Weekly Court on June 5th, 1900, before ROBERTSON, J.

*Statement*

*Haverson*, for the motion. At the time the by-law was passed six places were named in it as the places where the vote of the electors was to be taken, but no deputy re-

**Argument.** turning officers were named. As a matter of fact, no deputy returning officers were appointed for the purpose but the deputy returning officers for holding the ordinary municipal elections were subsequently appointed and they took the vote on the by-law when the municipal elections were held. That was not sufficient. The deputy returning officers must be named in the by-law. R.S.O. (1897), ch. 245, sec. 141 and ch. 223, sec. 338. The township clerk may act as deputy returning officer where the municipality is not divided into polling sub-divisions; but here the municipality was so divided and he had no power to act and could not superintend the other deputy returning officers: R.S.O. (1897), ch. 223, sec. 349. I refer to *Re Pickett and Township of Wainfleet* (1897), 28 O.R. 464; *In re Pounder and the Village of Winchester* (1892), 19 A.R. 684.

*G. M. Vance*, contra. The alleged defects complained of are mere irregularities and are not fatal unless they affect the result, and the court should sustain the popular voice where it is evidenced, as here, by a substantial majority. The by-law in question mentioned the "deputy returning officers" and another general by-law even if subsequent in point of time regularly named and appointed them: R.S.O. (1897), ch. 223, sec. 106. The requisites of the Act have been substantially complied with: sections 204 and 351; *Regina ex rel Walker v. Mitchell* (1868), 4 P.R. 218; *In re Wycott and The Corporation of the Township of Ernestown* (1876), 38 U.C.R. 533. In *Re Pickett and Township of Wainfleet* the judgment might have been the other way if the majority had been large: *per OSLER, J.A.*, at p. 466.

*Haverson*, in reply.

June 8th, 1900. ROBERTSON, J.:—

The motion is for an order quashing by-law No. 390 of the municipality of the Township of Mulmur, passed

under the Local Option Act, to prohibit the sale of liquor within the municipality, etc. There are several objections made to the by-law, but the following are what were pressed: 1st. That the parties who acted as deputy returning officers in taking the votes of the electors, took said votes without any authority whatever, never having been appointed by the council of the municipality to take the same. 2nd. That Geo. Lacking, the clerk of said council, acting as a deputy returning officer at polling sub-division No. 3 of said township.

**Judgment.**  
**Robertson, J.**

The local option clauses of the Liquor License Act, R.S.O. (1897), ch. 245, sec. 141, declare that the council of every township may pass by-laws for prohibiting the sale by retail of spirituous liquors, etc., provided that the by-law, before the final passing thereof, has been duly approved by the electors of the municipality in the manner provided by the sections in that behalf of "The Municipal Act."

Now, section 338 of the Municipal Act, R.S.O. (1897), ch. 323, declares that "In case a by-law requires the assent of the electors, before the final passing thereof, the following proceedings (*inter alia*) shall, . . . be taken for ascertaining such assent: 1. The Council shall, by the by-law, . . . (where the votes are to be taken at more than one place) name a deputy returning officer to take the votes at every such place, . . . ."

The by-law, as published, section 2, is in these words: "That the vote of the electors of the said township of Mulmur will be taken on the by-law by the deputy returning officers on Monday, January 1st, 1900, commencing at nine o'clock in the forenoon and continuing until five o'clock in the afternoon at the undermentioned places, . . . ."

As a matter of fact, at the time of the passing of the first and second readings of the by-law by the council, and at the time of the publication thereof—December 7th, 1899—no deputy returning officers were named or

Judgment.  
Robertson, J.

appointed to take said vote, but, subsequently, on the 15th December, 1899, a by-law was passed by the council appointing deputy returning officers for the year 1900, but no reference therein is made to these returning officers as being authorized to take the vote under the proposed prohibition by-law.

It was urged that this was a mere irregularity, and should not affect the validity of the by-law. I cannot subscribe to that suggestion. The right to pass this by-law, which interferes with the rights of the ratepayers, is created by statute, and that statute points out in positive terms what must be done in order to ascertain the votes of the ratepayers on the question submitted.

The word is "shall" not "may" and that must be complied with by stating the names of the deputy returning officers in the by-law that is published. That was not done, nor does it appear that the names of the deputy returning officers for 1900 were ever published, and that omission, in my judgment, is fatal to the by-law; and I need not consider the other objections.

I am, therefore, of opinion, after considering the facts and the several cases cited by the respective counsel for the applicant and the municipality, that the by-law must be quashed, and, I think, with costs to be paid by the municipality.

G. A. B.

## [DIVISIONAL COURT.]

## ENGLISH V. LAMB.

*Defamation—Slander—Privileged Occasion—Malice—What Constitutes—  
Misdirection—New Trial.*

In action for slander where the occasion was privileged the Judge at the trial in defining malice, which it was essential for the plaintiff to prove, told the jury that it consisted of a reckless statement, of a statement not true, made without consideration of what the probable consequences might be to another person, and of a statement not made in good faith—not truly, but wantonly and recklessly, and without proper consideration:—

*Held* misdirection, for it should have been left to the jury to say whether the defendant acted through a wrong feeling in his mind against the plaintiff—some unjustifiable intention to do him wilful injury; and a new trial was directed.

THIS was an action of slander, the arrest of the plaintiff, in consequence of the alleged slander, being laid as special damage.

Statement.

The action was tried before FALCONBRIDGE, J., and a jury, at Toronto, on February 7, 1900.

The statements alleged to have been made by the defendant, on which the action was based, were statements as to the plaintiff being the person from whom he had purchased a ticket for the Spring race meeting of the Ontario Jockey Club. The ticket, which was a complimentary one issued to the press, and was not transferable, had been lost or stolen and then sold to the defendant.

The additional evidence, and the charge of the learned Judge, so far as material, are set out in the judgment.

The jury found for the plaintiff with \$150 damages.

From this judgment the defendant appealed to a Divisional Court.

On May 9, 1900, before a Divisional Court, composed of FERGUSON and ROBERTSON, JJ., the appeal was argued.

*Wallace Nesbitt, Q.C.*, for the appellants:—The plaintiff failed to prove that any slander was uttered. There



Argument.

is no charge of any crime having been committed by the plaintiff. The most that can be charged against the defendant is that he said he got the ticket from the plaintiff. This does not impute that the plaintiff had stolen it, or had come by it dishonestly. The case is one of qualified privilege. The statements relied on by the plaintiff were made in answer to questions put by the detective officers, and malice therefore should have been proved. There was misdirection in the learned Judge in telling the jury that the privilege was taken away if the statements were made recklessly. The question is, was there honest belief, and did the defendant, on being questioned by the detective, answer honestly? If there is honesty of purpose the privilege remains: *Clark v. Molyneux* (1877), 3 Q.B.D. 237; *Blogden v. Bennett* (1885), 9 O.R. 596.

*George Ross, contra*:—There was sufficient proved here to constitute slander. The whole discussion was about a stolen ticket, and it was in the mind of every one that the reference to the plaintiff was as to passing off of a stolen ticket. The qualified privilege was removed. The evidence submitted to the jury shewed that the defendant did not make the statements *bonâ fide*; that he did not make them believing them to be true; for at the time he made them he did not believe that the plaintiff was the man from whom he got the ticket. In giving his answers to the questions asked him, the point to be considered is, did he do so with an honest mind? He must not only act honestly, but he must not act recklessly, as recklessness in such a case is tantamount to dishonesty: *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431; *Fraser's Law of Libel and Slander*, 2nd ed., p. 150; *Robertson v. Dunn* (1897), 24 A.R. 287; *Boydell v. Morrow* (1898), 15 Q.L.R. S.C. 191; *Stuart v. Bell*, [1891] 2 Q.B. 341.

May 26th, 1900, FERGUSON, J.:—

**Judgment.**

**Ferguson, J.**

The action is for alleged slander, special damages being laid. The verdict is assumed to be for the plaintiff. The damages assessed are \$150, and judgment has been ordered to be entered for the plaintiff for this sum with costs.

The motion is to set aside the judgment, and to enter a judgment for the defendant or for a new trial, or for other relief generally.

Several grounds for the motion are stated, amongst others, that there should have been a nonsuit, and for misdirection of the jury by the learned Judge.

There would be difficulty in saying that there should have been a nonsuit, and I apprehend this was perceived by counsel, for the chief argument before us had relation to the alleged misdirection.

It appears from the evidence that the defendant had purchased a ticket for the Woodbine races which, in the hands of a proper holder of it, would entitle him to attend at the races during the whole of the racing period. As part of the period had passed before the defendant purchased the ticket he paid for it only a part of the original price. At the time of his purchase the defendant asked where the ticket came from, and he says he was told that the ticket was all right; that it was a press-man's ticket, the person nodding his head (as shewn); and he says he took it as granted that the ticket came from the plaintiff who lived, or had lived, on the corner not far away from the place where they were when this conversation took place.

It does not appear that any use was made of the ticket till the Saturday of the racing period, when the defendant gave it to one Clark, who attended the races with it. It seems that the ticket was not "all right," as had been stated, but was a lost and found one, or something of the sort; at all events, it was not recognized as a good ticket, and Clark was in trouble with the police officers. Learning of this the defendant told the officers, or one of them,

Judgment.

Ferguson, J.

that it was he who gave the ticket to Clark. The defendant being then asked where he got the ticket said, according to his own evidence, "I think the ticket came from English" (the plaintiff); "I think it was English's ticket," and upon being asked who English was answered, "He is a press-man living on the corner above me." There is evidence going to shew that the defendant said positively that he got the ticket from the plaintiff, English. The plaintiff was arrested and kept under restraint for a short time, and this is what is laid as special damage. Shortly, very shortly, after, the defendant was informed by a person named Willis that the ticket or badge did not come from the plaintiff but from another press-man named Mason, who had been living with the plaintiff, when he immediately gave this information and offered to make all the amends in his power. The foregoing is a much curtailed statement of the facts so far, but it seems sufficient to enable me to understand the matters under discussion.

The statement of claim is drawn in a somewhat rambling form, but the charge seems to be that the defendant falsely and maliciously spoke and published of and concerning the plaintiff the aforesaid words, alluding to the words "It is the badge I bought in the bar from English," and other words of the same import, meaning thereby that the plaintiff had sold him (the defendant) the "stolen badge" in question, well knowing that the plaintiff would be arrested, &c.

It was not contended that the words spoken were actionable *per se*, and it was contended that the occasion was one of "qualified privilege." This was also the holding of the trial Judge. The learned Judge in charging the jury is reported to have said: "There is a case, if at all, against the defendant of reckless statement, a case of a statement not true, made without consideration of what the possible consequences might be to another person, and that is malice, but not malice of the kind that would entitle you to say that very large damages might be

awarded." The learned Judge in another part of his charge said: "Malice in the ordinary signification means a grudge or ill-will against a person. That has not been attempted to be proved here, but it is not necessary to prove it in a great many cases, and I hold that it is not necessary to prove it here, that is, if you come to the conclusion that the statements made by Lamb to the officer were not made in good faith, not truly but wantonly, and recklessly and without proper consideration."

Judgment.

Ferguson, J.

The finding of the jury was that the defendant was reckless in the assertion he made, and they assessed the damages as above, and on this finding rests the verdict and judgment for the plaintiff. In the case of *Clark v. Molyneux* (1877), 3 Q.B.D. 237 at p. 249, Cotton, L.J., said: "When once the learned Judge had laid down that the occasion was privileged, the only question for the jury to consider was whether the defendant acted from a sense of duty or was actuated by some improper motive, and the onus of proving that the defendant was influenced by some improper motive, that is, that he acted maliciously, was on the plaintiff." And the statements of the other learned judges in the case are in accord with this view. That case is referred to very often as truly stating the law.

In the case *Jenoure v. Delmege*, [1891] A.C. 73, *Clark v. Molyneux* is referred to with approval, and the proposition regarding the burden of proof clearly stated and emphasized.

In *Fraser's Law of Libel and Slander*, p. 150, the author refers to many of the leading cases on the subject. He says: "If the occasion is privileged the plaintiff must prove malice in fact. The burden of proving this is on him as was settled in *Clark v. Molyneux*. Malice in fact is not confined to personal spite or ill-will but includes every unjustifiable intention to inflict injury on the person defamed, and every wrong feeling in the man's mind.

In the case *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431, at pp.

Judgment.  
Ferguson, J.

443, 444, Lord Esher explained the meaning of the word malice in relation to a privileged occasion in this way: "The question is whether he" the person "is using the occasion honestly or abusing it. If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion. . . . But there is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held by a jury to have abused the occasion, and in that sense to have spoken maliciously. . . . If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held that a jury is justified in finding that he has abused the occasion."

Malice may be proved by shewing that the defendant knew the words were untrue when he spoke them, or that they were uttered with the intention of injuring the plaintiff, or that the plaintiff and defendant were rivals and had previously quarrelled, or that the defendant was actuated by personal resentment or any other wrong motive: see the cases collected in *Fraser's Law of Libel and Slander*, 2nd ed., at p. 152.

In *Clark v. Molyneux* (1877), 3 Q.B.D. 237, L.J. Brett, at p. 247, says: "But here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind." The same learned Judge in the same case says: "So if it be proved that out of anger, or some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive."

I have looked at a number of authorities, amongst others *Robinson v. Dunn* (1897), 24 A.R. 287, and I am of the opinion that the learned Judge was in error in defining malice when he used the words above quoted, "There is a case, if at all, against the defendant, a case of a statement

not true but made without consideration of what the possible consequence might be to another person, and that is malice." It should, as I think, have been left to the jury as well to consider whether or not the defendant in making the statement acted by reason of a wrong feeling in his mind against the plaintiff, some unjustifiable intention to inflict injury upon the plaintiff, and if they could not find this against the defendant they could not properly find against him on the question of malice, and without a finding on this question against the defendant there could properly be no verdict for the plaintiff.

It will be seen, too, that the finding of the jury is that "the defendant was reckless in the statement that he made." apparently following the words of the learned Judge. This finding is, as I think, consistent with the absence of malice on the part of the defendant and it is, as I think, not a finding on which a verdict or judgment could properly be entered for the plaintiff. The real question between the parties has not I think been tried at all, and I think it a proper case to set aside the verdict and judgment ordered and entered, and to order that a new trial should be had, the costs of the former trial and of this appeal to abide the event.

ROBERTSON, J.:—

I have carefully considered the evidence and the learned trial Judge's charge to the jury, and I have also considered all the cases on the questions involved in this case, and having been favoured with a perusal of my brother Ferguson's very full and learned exposition of the law, as applicable to the facts, I entirely concur in the result arrived at by him, and agree that there should be a new trial, the costs of the former trial and of this appeal to abide the result.

G. F. H.

Judgment.  
Ferguson, J.

## [DIVISIONAL COURT.]

## LARKIN V. LARKIN.

*Lien—Mechanics' Lien—Trial—Procedure—Mortgagees—Materials on land.*

The procedure for the trial of an action under the Lien and Wage-Earners' Act, R.S.O. ch. 153, is the ordinary procedure of the High Court, which is not affected by sections 35 and 36 of the Act; and, therefore, a prior mortgagee against whom relief is sought must be made a party to the action within the time limited by sub-sec. 1 of sec. 24.

Materials were placed on the land by the owner thereof and paid for by the mortgagee, to be used in the construction of buildings being erected thereon, but were not actually incorporated therein.

The materials were taken by the owner to a planing mill to be planed for placing in the buildings, and having been left there for some time, and storage charges incurred, the mortgagee sold them to the mill-owner.

Per MEREDITH, C.J.—No lien attached on such materials, the incorporation thereof in the building being an essential element.

Per ROSE and MACMAHON, J.J.—A lien would attach, notwithstanding the absence of such incorporation, but there having been a conversion, no relief could be granted, for there is nothing in the Act enabling the court to assess damages which could be made applicable to lienholders.

**Statement.**

THIS was an appeal and cross-appeal from the Local Master at Hamilton, in a Mechanics' Lien proceeding by the plaintiffs, who claimed to be lienholders.

The appeals were argued on the 19th day of January, A.D. 1900, before a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, J.J.

*Kirwin Martin*, for plaintiffs.

*John G. Farmer*, for mortgagees;

The facts are fully set out in the judgment of the learned Chief Justice.

May 17th, 1900. MEREDITH, C.J.:—

The liens claimed are for wages due to the plaintiffs for work done on six houses which were being erected by the defendant Larkin on lands in Hamilton of which he was the owner, and William Hersee and Kinrade are mortgagees.

Judgment.

Meredith, C.J.

The claims of the plaintiffs were registered on the 8th March, 1899; the action was begun by the filing of the statement of claim on the 10th day of May, 1899, and a certificate was on the same day registered, pursuant to sub-section 1 of section 24 of the Mechanics' and Wage Earners' Lien Act, R.S.O. ch. 153.

The only defendants to the action were the defendants Larkin and Alfred Ernest Hersee.

The claim of the plaintiffs as against the defendant Hersee, who is alleged to be a mortgagee of the land on which the liens are claimed, according to the statement of claim, is based upon the assumption that the work in respect of which the liens are claimed, was done by the plaintiffs with the privity or consent of the defendant Hersee (sec. 2, sub-sec. 3); and the relief claimed is that in default of payment of the claims of the plaintiffs, the estate and interest of both defendants in the lands and buildings may be sold to satisfy the claims.

By an amendment to the statement of claim, made on the 15th June, 1899, the plaintiffs alleged that a car load of lumber was delivered on the lands in question for use in the construction of the buildings, and that the defendant Hersee had wrongfully sold it and converted it to his own use; and the plaintiffs also alleged that by reason of the services and work performed by them, and by other services and work, and by materials supplied, the selling value of the lands was increased; and the plaintiffs added to their claim a claim that the moneys alleged to have been wrongfully received by the defendant Hersee for the lumber should be declared to be subject to their liens, and that he should be directed to pay those moneys into Court.

The defendant Hersee on the 15th February, 1899, assigned his mortgage to William Hersee, and thereby ceased to have any interest in it. The assignment was registered on the 15th April, 1899.

Kinrade's mortgage is dated the 12th February, 1899, and was registered on the 22nd day of the same month.



Judgment.

Meredith, C.J.

The plaintiffs, on the 6th June, 1899, served notice of trial of the action on William Hersee and Kinrade as well as on the defendants and some other persons.

The learned Master has found against the contention of the plaintiffs as to the liability of the estate and interest of the defendant Hersee for the claims of the plaintiffs, has directed the defendant Hersee to pay into Court \$134.75 with interest from 7th March, 1899, and the defendant Larkin to pay into Court \$25, with interest from 1st March, 1899; has found that these two sums represent the value of materials delivered upon the lands and which, as he finds, "were appropriated by the respective parties whom he directs to pay their respective values into Court;" has found that "these moneys, if paid into Court, would form the bulk of the increased value which, exclusive of these moneys," he fixed at \$50; and he finds that Alfred Ernest Hersee's and Kinrade's mortgages are prior to and rank before the claims of the lienholders, and that a sale to realize the claims of the latter should be a sale only of the increased value which takes precedence of mortgagees' claims.

The defendant Hersee appeals from so much of this judgment as directs him to pay into Court the \$134.75, and so much of it as declares that the lienholders are entitled to rank upon the increased value of the lands.

And the plaintiffs appeal against the judgment upon the grounds:

(1) that the Master should have found that their liens are upon the estates and interest of the defendant Hersee and his assignee William Hersee, as well as upon the estate and interest of the defendant Larkin;

(2) that the Master should not have held that Kinrade's mortgage had priority over the claims of the lienholders;

(3) that the Master should have found that the plaintiffs, as wage-earners, were entitled to priority over the mortgage of the defendant Hersee and of the other lienholders for 20 per cent. of the moneys paid by the defend-

ant Hersee on account of work, services and materials done, performed or placed in respect of the building of the houses ;

Judgment.  
Meredith, C.J.

(4) that the Master should have found that the plaintiff Chisholm was entitled to an order for the payment by the defendants personally of his claim for \$13.00 ;

(5) that the Master should have found that the building operations were stopped owing to the defendant Hersee having refused to carry out his agreement for the advance of the moneys secured by his mortgage, and that the Master should have reduced his claim by the amount of the damages sustained by the defendant Larkin in consequence of such refusal ;

(6) that the Master should have directed a sale of the lands and the payment of the proceeds of the sale in satisfaction of the plaintiffs' claim in priority to the mortgage to the defendant Hersee ; or, at all events, in priority to it, to the extent of the increased value ; or if not entitled to either priority, that the lands should have been directed to be sold and the proceeds applied first in payment of the mortgage to the defendant Hersee and then in payment of the claims of the lienholders.

In order to a clear understanding of that of which the respective parties complain, it is necessary to mention that the loan secured by the mortgage to the defendant Hersee was a building loan, and that by an agreement made contemporaneously with the mortgage it was recited that the defendant Larkin was the owner in fee subject to a mortgage for \$350 and interest of the mortgaged lands, and that he had applied to the defendant Hersee for a building loan of \$4800 to enable him to build six houses on them, and by it the mortgagor agreed to build the six houses according to certain plans and specifications, at a cost of not less than \$1200 for each house ; and the mortgagee agreed to pay out of the loan the \$350 mortgage and the expenses of the loan, and to advance all the moneys required to pay for wages and for hire of teams

Judgment.

Meredith, C.J.

every two weeks as the work progressed on the certificate of Robert Chisholm, who was named as inspector; and to pay firstly for the materials, and secondly to the contractors to the extent of the value of the work, less 20 per cent. of it, and less any sum previously paid for wages, material or otherwise, when the foundations were laid; to make the like payments as to further work when the first story should be completed, and the like payment as to further work as soon as the roof should be completed; these advances all to be made on the certificate of Chisholm; and to advance the remainder of the \$4800 according to the certificate of Chisholm as he should certify to its being paid, the mortgagee, however, retaining for thirty days from the completion of the building twenty per cent. of the value of the work done and materials furnished; the agreement also provided that Chisholm should be paid a sum not exceeding \$30 for his services out of the loan on the order of the mortgagor, and that the mortgagee should pay for a carload of lumber to be used in the construction of the buildings on it being delivered on the lands, and on Chisholm's certificate being given therefor.

The agreement contains some other provisions to which it is not necessary to refer.

The three months within which it was necessary that proceedings to realize the claim of the plaintiffs should be begun in order that their registered lien should not, according to the provisions of sub-sec. 1 of sec. 24, "absolutely cease to exist," expired on the 11th May, 1899.

The first question to be considered is whether in these circumstances the estate and interest of William Hersee, the assignee of the defendant Hersee in the lands in question, is subject to any lien in favour of the plaintiffs operating either upon the whole of his estate and interest in, or to the extent of the increased selling value of, the land under sub-sec. 3 of sec. 7.

This question must, I think, be answered in the negative. The action which is necessary to be begun to save the lien from ceasing absolutely to exist, according to the provisions of sub-sec. 1 of sec. 24, must have as parties to it all persons whose rights or interests are sought to be affected, unless, according to the ordinary practice of the Court, such persons may be added as defendants after judgment. That, as I understand it, is the effect of the judgments of the Court of Appeal in *Bank of Montreal v. Haffner* (1884), 10 A.R. 592, affirmed by the Supreme Court of Canada *sub. nom. Bank of Montreal v. Worswick*, Cassel's Sup. Ct. Digest of 1893, page 526, and *Cole v. Hall* (1889), 13 P.R. 100.

Judgment.  
Meredith, C.J.

Neither William Hersee nor Kinrade, whose interests in the lands in question are sought to be affected by the plaintiffs' action, has ever been made a party to the action unless the service of notice of trial upon them made them parties, and that was long after the 90 days mentioned in sub-sec. 1 of sec. 24 had expired.

Whether the plaintiffs' claim was as to William Hersee either that his estate and interest in the lands were bound because the work they did was done with his privity or consent, or that their liens were entitled to priority over his mortgage to the extent of the increased selling value of the lands, or as to Kinrade that his mortgage was to be postponed to their liens because of the alleged notice of them, it is clear that to entitle them to obtain that relief, if the action were an ordinary one for the enforcement of the liens, the mortgagee against whom such relief is sought must be made a party to the action, and cannot properly be added as a defendant in the Master's office, on a reference as to incumbrances directed by the judgment in an action against the mortgagor for the enforcement of the lien, which, according to the practice, must be limited to subsequent incumbrances.

The machinery for the enforcement of liens has no doubt been changed since the Act which the Courts had to

Judgment.

Meredith, C.J.

construe in the two cases to which I have referred; and it was argued that these cases have no longer any application in the changed condition of the legislation; and in support of that contention *Duften v. Horning* (1895), 26 O.R. 252, was referred to; but on an examination of that case it will be found not to support the contention of the plaintiffs' counsel, but to be an authority against it. The question in that case arose on the Act of 1890, 53 Vict., ch. 37 (O), by the provisions of the 13th sec. of which the Master or referee, upon the return of the appointment to take accounts, was empowered, where there was a prior mortgage or charge and *the holder was a party to the proceedings*, to inquire and determine as to whether the selling value of the land was increased by reason of the work or materials for which a lien was claimed on the land, and the statement of facts shews that the statement of claim had been amended by adding the prior mortgagee as a defendant before the 90 days had expired, and by claiming priority for the lien over her mortgage and not merely as to the increased value; and what my brother Street decided was that the plaintiffs could not by the summary proceedings provided by that Act make the prior mortgagee a party for the purpose of having her mortgage postponed to the claim of the lienholders, but could only by those proceedings make her a party defendant for the purpose of obtaining priority to the extent of the increased selling value; that he thought that, even for this purpose, she should be made a defendant in the statement of claim is apparent from the order which he made, which was to strike her name out of the proceedings unless the plaintiffs should amend their statement of claim by making proper allegations to support the claim for priority as to the increased selling value, which he gave them leave to do within two weeks, on filing an affidavit verifying the truth of the proposed amendments.

The Act now in force contains no such provision as that to which I have referred as contained in section 13 of the Act of 1890.

The liens created by the Act may now be realized by actions in the High Court according to the ordinary procedure of that Court, except where the same is varied by the Act.

Judgment.  
Meredith, C.J.

One of the variations is that the action is required to be commenced by the filing of a statement of claim verified by affidavit. Another is that, besides being tried at the sittings of the High Court by a judge of that Court, the action may be tried by the Master in Ordinary, a local Master, an Official Referee or a Judge of the County Court in any County or Judicial District in which the lands are situate.

Where the action is to be tried by a judge of the High Court, the ordinary procedure applies, but where either party elects to have the action tried by any of the judicial officers mentioned, or a judge of the County Court, sec. 35 provides a special procedure for that mode of trial; and sec. 36 provides for the persons upon whom the notice of trial is to be served, among whom are enumerated "all . . . persons having any charge or incumbrance, or claim on the lands, who are not parties, or who, being parties, appear personally in the said action."

By the provisions of sec. 35 the trial is to be of the action and all questions which arise therein or which are necessary to be tried to completely dispose of the action, and to adjust the rights and liabilities of the persons appearing at the trial or upon whom notice of trial has been served, and the judge or other officer is to "take all accounts, make all inquiries, and give all directions, and do all other things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action or at the trial, and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action or who have been served with notice of trial."

I do not think that the language of secs. 35 and 36, to which I have referred, wide and comprehensive as it

Judgment.

Meredith, C.J.

doubtless is, was intended to make so radical a change in the procedure as to enable a plaintiff, who has not made parties to his action, persons who, according to the ordinary procedure are necessary parties to it and cannot be made parties after judgment on a reference as to incumbrances, to serve them with notice of trial, and bind them in the same way as they would have been bound by the judgment in an action to which they were made parties before the trial according to the ordinary practice of the Court. To hold that he may do this would be to decide that the judge of the County Court, or officers having authority to try the action, may do that which a judge of the High Court at the trial of the action cannot do, and would involve the necessary result, I think, that if the trial took place before a judge of the High Court the decision must be that the lien had ceased to exist as against the estate of persons who ought to have been and have not been made parties to the action within the period fixed by the Act, and if it took place before a judge of the County Court or one of the officers having power to try the action the lien must be held to be a subsisting one as against the same estate. Such an anomaly can hardly, I think, have been contemplated by the legislature, and, unless the language which it has used is open to no other construction, it ought not to be so interpreted.

Looking at the language used in the light of the limited application of the procedure which it makes provision for, and at the general rule laid down, that the procedure is to be the ordinary procedure of the Court, except where it is varied by the Act, secs. 35 and 36 are to be read, I think, as making no change in the law as laid down in the two cases to which I have referred, as to the necessity of making a mortgagee, against whom the plaintiffs are seeking such relief as is sought in this case, a party to the action within the period fixed by sub-sec. 1 of sec. 24.

I am, therefore, of opinion that as against William Hersee's estate and interest and as against the estate and interest of Kinrade in the lands in question the liens of the plaintiffs, if they ever attached upon either, as to which it is not necessary to express any opinion, have absolutely ceased to exist, and that they have also absolutely ceased to exist as to the increased selling value (if any) under sub-sec. 3 of sec. 7.

Judgment.  
Meredith, C.J.

The claims of the plaintiffs in respect of the carload of lumber is also, in my own opinion, not well founded.

I do not find anywhere in the Act any provision that the claims of lienholders are to attach upon materials placed upon the land to be used in the building, and which have not been incorporated in it.

Sec. 4 is the one which confers the lien, and it gives no colour to the contention that a lien attaches on such materials, though it gives the benefit of the lien upon the erection, building, &c., and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are placed or furnished to be used.

The effect of this section is no doubt to give to the material man who places or furnishes materials to be used in the erection of a building a lien, although the materials are not in fact used for the purpose for which they are supplied; but the lien is upon the building and the land occupied or enjoyed with it, or the land upon which the materials are placed or furnished to be used, and only on the building and land or the land, as the case may be, and not on the materials, unless they have become part of the building or land.

Then by sec. 7, sub-sec. 1, it is provided that the lien is to attach upon the estate and interest of the owner in the building upon or in respect of which the materials are placed or furnished to be used, and the lands occupied thereby or enjoyed therewith.



Judgment.

Meredith, C.J.

It is true that sub-sec. 1 of sec. 16 speaks of materials affected by the lien, and provides that no portion of them shall, during the continuance of the lien, be removed to the prejudice of the lien, and that any attempt at removal of them may be restrained; and by sub-sec. 3 of the same section provision is made that when any material is brought upon land to be used in connection with the land for any of the purposes mentioned in sec. 4, it is not to be subject to execution or other process to enforce any debt (except for the purchase of it) due by the person furnishing the material; and by sub-sec. 3 of sec. 35, the judge, or other officer who tries the action, is authorized to direct the sale of any materials and authorize the removal thereof.

What the Legislature had in view in enacting these provisions it is very difficult to understand; but, in my opinion, they do not make the materials not incorporated so as to become part of the building or of the land subject to the lien.

I am unable to understand how it can be said in the language of sub-sec. 3 of sec. 7 that "the selling value" of mortgaged land is increased by the furnishing or placing of materials upon it, unless these materials are incorporated with the land so as to form part of it. It is the selling value of the *land* which must be increased, and that, as it seems to me, can be only when the materials have become part of the land.

A mortgagee acquires no right to materials brought upon the mortgaged land by his mortgagor to be used in the construction of buildings to be erected on it, and they do not by being placed there lose their character of chattels.

The purpose of the Act was to give a lien upon land which at common law did not exist, and the sections giving the lien standing alone, beyond question confine the lien to the land and its appurtenances—and that cardinal principle of the Act is not in my opinion to be departed from, unless the language which is relied on to extend the lien to something that is not land, is plain and unambiguous.

Judgment.

Meredith, C.J.

It is clear, I think, that if the land is not encumbered by mortgage, it is only the interest of the owner in the land upon which the lien is to attach, and it would seem somewhat anomalous, if, where the land is mortgaged, the lien is as against the mortgagee, to be deemed to attach to chattels even though brought on the land to be used in the building intended to be erected upon it, and chattels too the right to which there is no provision for transferring to the mortgagee.

The language of sub-sec. 1 of sec. 16 is not inconsistent with the view which I have taken as to the extent of the lien—the provision as to the removal of materials which it contains is limited to “the continuance of the lien” and “to materials affected by it;” and the only removal which is forbidden is a removal “to the prejudice of the lien.”

The sub-section may have been intended to prevent materials upon which a lien has attached, by their being incorporated with the land, from being removed, even by arrangement between the persons who furnished them and the owner to the prejudice of other persons having liens upon the land; but, however that may be, there is, in my opinion, nothing in the language used which extends the lien beyond that upon which by the preceding provisions of the Act it is declared to attach.

Nor is the provision of sub-sec. 3 of sec. 16 in my opinion indicative of an intention to enlarge the scope of the lien—its apparent purpose is to protect a person, who has brought materials upon the land to be used in connection with it for a purpose within sec. 4, from being prevented from using the materials for the intended purpose by creditors who desire to make them available for the payment of his debts, not being debts for the purchase of the materials; indeed the provisions of this section make against the argument that materials brought upon the land to be used, though not used in the building, are *ipso facto* bound by the lien. If they are bound, why should the

Judgment.  
Meredith, C.J.

unpaid vendor be at liberty to sell them in execution on a judgment recovered for their price, and what the necessity for protecting them from sale under execution for other debts of the person furnishing them being already *ex hypothesi* bound by the lien and liable to be sold only subject to it?

Sub-sec. 3 of sec. 35 is also, in my opinion, to be read as referring to materials incorporated with the land, and it may well be that the provision was intended to enable the judge or officer who tries the action to permit materials, which have become affixed to the land, so as to form part of the freehold, to be severed and sold separate from it where that course is deemed best; in such a case as that of machinery, severable without injury to it or the building in which it is placed, or of a building partly completed and the completion of which is abandoned, it might be the best course to sell the machinery apart from the building or the materials of the uncompleted building apart from the land.

The claim for a deduction from the mortgage debt due to Hersee of the damages alleged to have been sustained by the mortgagee from his discontinuing the advances agreed to be made fails for the reason I have given as to the rights of the assignee not being affected by these proceedings, even if there be not another sufficient answer to the claim as to which it is unnecessary to express any opinion.

The claim as to 20 per cent. of the value of the work, service and materials actually done, placed or furnished, fails also for the same reason, for which I have come to the conclusion that the claim against the mortgagee's interest fails.

The appeal as to the claim of Chisholm was disposed of at the argument adversely to the claim.

The result is that the appeal of the defendant Hersee and of the mortgagee Hersee must be allowed with costs, and the claim as against them dismissed with costs; and the cross-appeal must also be dismissed with costs.

ROSE, J.:—

Judgment.

Rose, J.

I am in accord with the view of the learned Chief Justice as expressed by him, save as to the claim in respect of the car load of lumber, as to which I agree in the result only.

I am of the opinion that the placing of the lumber entitled the lienholder to rank upon the increased value, if any there was, in priority to the mortgages.

Sub-sec. 3 of sec. 7 provides (leaving out the parts that are not material):—"In case the land . . . upon or in respect of which materials are placed or furnished to be used, is encumbered by a prior mortgage or other charge, and the selling value of the land is increased . . . by the furnishing or placing of the materials, the lien under this Act shall be entitled to rank upon such increased value in priority to the mortgage or other charge." The increased value must be the value of the land plus any increase caused by placing or furnishing the materials to be used.

One can well understand how the value of land may be increased by the placing of materials. Assume, for instance, that upon a lot were placed all the materials necessary to the erection of a building, so that nothing remained to complete the building save the labour, the selling value of that land to any one who knew that the materials thus placed were to go with the land, would be increased by the value of the material for the purpose of erecting the building, and we find by section 16 that "during the continuance of a lien no portion of the materials affected thereby shall be removed to the prejudice of the lien, and any attempt at such removal may be restrained on application to the High Court, or to a judge or officer having power to try an action to realize a lien under this Act."

Sub-sec. 2 provides for costs.

Sub-sec. 3 provides as follows: "When any material is actually brought upon any land to be used in connection

Judgment.

Rose, J.

with such land for any of the purposes enumerated in sec. 4 of this Act," amongst other things, erecting, fitting, altering, improving, or repairing of any building," etc., "the same shall not be subject to execution or other process to enforce any debt (other than for the purchase thereof) due by the person furnishing the same."

Thus we see, by sec. 16, when the material is placed upon the land, it is not to be removed, and is not subject to execution, save as stated.

Then we find that by sec. 35, sub-sec. 3, "The judge or officer who tries the action may also direct the sale of any materials and authorize the removal thereof."

The effect of these provisions seems to me to be that when materials are placed or furnished, to be used upon land encumbered by a prior mortgage, as such material may not be removed, it is to be taken to be incorporated with the land for the purposes of the lien to the same extent as if it were placed in the building erected or in course of erection; and that the person furnishing the material has, as against the mortgagee, a prior lien upon the value of the land to the extent of the increase of such value by the placing or furnishing of such materials.

I think that a person removing such materials after they have been placed upon the land, would be in the same position as one who removed a building from the land, and, as against him, if he be the owner, the land must be taken to be of the value that it would have been had such material not been removed; and that for the purpose of working out the rights of the parties there should be an ascertainment of the amount by which the increased value has been reduced by reason of the removal of such material, and that the owner removing the same should be made answerable therefor.

It is not necessary here to consider the power of the Court under the Act to order restitution either by replacing the material or paying its value, for the facts of this case, I fear, do not entitle the plaintiffs to any relief. The

lumber was brought upon the premises at the instance of the defendant, Robert John Larkin, the owner of the land, subject to the mortgages. It was paid for by the defendant Alfred Ernest Hersee, and then at the defendant Larkin's instance was taken to a planing mill to be prepared for placing in the building. Larkin did not pay for the work done upon it, and left it at the mill until the millowner threatened to charge storage, when the defendant Hersee sold it to the millowner, receiving less than he paid for it. It should be observed that Hersee had nothing to do with taking the lumber from the premises.

Judgment

Rose, J.

Assuming, as I think the facts and the law shew, that the lumber was brought upon the premises to be placed in the building and became subject to the lien, that its removal was proper, and was not to the prejudice of the lien to which it continued subject, that the defendant Hersee acquired no rights by paying for the lumber, such payment constituting merely an advance under his mortgage, the lien still remained, the lien-holders were entitled to have the lumber taken back to the premises upon payment of the millowner's charges for work done upon it, and the lien was not affected by the payment to Hersee by the millowner, who held the lumber thereafter still subject to the lien.

The most that can be argued as against Hersee is that he did an act which amounted to conversion.

Assuming for the sake of argument this to be so, can it be said to have been a conversion of the plaintiffs' property? Again, assume that it was, what procedure is given by the Act to enable the plaintiffs to have damages assessed against him for such wrongful act?

The lien might have been enforced notwithstanding the payment by the millowner to him, while the lumber remained in the millowner's hands, and it may be that the Act gives the Court full power to protect the property against a wrong doer so as to prevent its removal or order its restitution, and so to preserve the rights of the lien-

Judgment.

Rose, J.

holders; but I do not see anything in the Act enabling the Court to assess damages against one converting property as was done here, so as to give lien-holders the benefit of such damages by dividing them among them.

For these reasons I concur in the disposition of the appeals.

MACMAHON, J.:—

I concur in the judgment of the learned Chief Justice, except as to that part of it relating to the carload of lumber, as to which I am unable to follow him in his reasoning as to the effect of the Act, although I agree in the result.

Where any person places or furnishes any materials, to be used in the erection of any building for any owner, contractor or sub-contractor, he shall by sec. 4 have a lien for the price of such materials upon the building and appurtenances thereto and the lands occupied thereby or enjoyed therewith or upon which such materials are placed or furnished to be used, for the amount justly due to the person entitled to the lien and to the sum justly owing by the owner; and by sub-sec. 3 of sec. 7, if the land "in respect of which materials are placed or furnished to be used, is incumbered by a prior mortgage . . . and the selling value of the land is increased . . . by the furnishing or placing of the materials, the lien under this Act shall be entitled to rank upon such increased value in priority to the mortgage."

It would, I consider, be too narrow a construction to say that under the language of these sections the material-man was limited in his lien to the increased value given to the land by the incorporation into the building of the materials furnished, for sub-sec. 3 of sec. 7 assumes that increased value may be given to the land without the material furnished being incorporated into the building, as it expressly provides for cases where "materials are

placed and furnished to be used . . . and the selling value of the land is increased . . . by [the furnishing or placing of the materials," then the lien is entitled to rank upon such increased value.

Judgment.  
MacMahon, J.

By the Revised Statutes of British Columbia, ch. 132, sec. 4, a lien is given on all materials furnished or procured for use in constructing or making such works or improvements so long as the same are about to be in good faith worked into or made part of the said works or improvements.

The *bona fides* as to the materials being made part of the works required by the above section of the British Columbia Act would be satisfied where it was shewn that a contract had been entered into with the owners of land for the erection of a building, and that the materials were furnished or placed upon the land "for use in the erection of such works or building." And no doubt could be entertained under this section as to a lien existing on all materials placed upon the land. Then how or in what way does our Act differ from the British Columbia Act? Both Acts make it necessary, in order that a lien be created in favour of the material man, that the "materials be furnished to be used" in the works or building. And, although our Act does not use the expression "about to be in good faith worked into or made part of said works," yet where in order that the lien may attach the materials must be "placed or furnished to be used" that must mean to be "used in . . . erecting . . . any building," etc. (sec. 4).

And besides if there were any question as to the meaning which should be attached to the language of sec. 4 and sub-sec. 3 of sec. 7 (which must be read together), the Legislature has, I consider, interpreted what meaning should be attached to the expression "materials to be used," but which have not in fact been incorporated in the works or building by providing (sec. 16) that during the continuance of the lien the materials are not to be



Judgment.  
MacMahon, J.

removed to the prejudice of the lien, and an attempt at removal may be restrained. If no lien existed in favour of the material man, unless the material was incorporated into the building on the land, the provision seemingly made in his favour by this section would be wholly illusory if not meaningless. Supposing at the time an action was commenced for enforcing a lien the lumber was on the lot, the Local Master could have ordered it to be sold (sec. 35, sub-sec. 3) and the proceeds of such sale would have inured to the benefit of the lienholders.

As pointed out in the judgment of Mr. Justice Rose, the lumber was removed by the defendant Robert John Larkin, and sold by the defendant Hersee, and for the reasons stated therein the Court is powerless to give the plaintiff any relief.

The appeal must be disposed of as provided in the judgment of the learned Chief Justice.

G. F. H.

## THE CORPORATION OF THE TOWN OF WHITBY

v.

## THE GRAND TRUNK RAILWAY OF CANADA.

*Railways—Bond of Provisional Directors—Bonus—Conditions—Liability to perform, after Amalgamation with other Companies.*

By the bond of a railway, executed by its provisional directors in consideration of a bonus in aid of the railway, the company agreed to erect and maintain workshops in a certain town during the operation of the railway.

The company, after certain changes of name, amalgamated with other companies and formed a larger one under another name, which latter company, although it had agreed to do so, ceased to so maintain the workshops.

This last mentioned company subsequently amalgamated with and became part of the defendants' system, and by the amalgamation the defendants became responsible for all the liabilities of the other companies:—

*Held*, that the bond of the provisional directors was a corporate act binding on its successors, and by consequence, on the defendants who had acquired the road: that the road, though it formed part of a larger railway connection represented by the defendants, was still in operation, and as the contract was to maintain the workshops during the operation of the railway, it remained a binding engagement, and a reference to ascertain the damages, if any, for breach of the covenant, was directed.

THIS was an action to compel the defendants, who had acquired The Port Whitby and Port Perry Railway Company, to restore and maintain certain workshops pursuant to the conditions of a bond given by the provisional directors of the latter company to the plaintiffs upon receiving a bonus in aid of the railway of \$50,000, or for damages for the breach thereof.

Statement.

The statement of claim set out the granting, in the year 1868, of the \$50,000 bonus to The Port Whitby and Port Perry Railway Company, the taking of the bond from the provisional directors, conditioned, amongst other things, "That the Port Whitby and Port Perry Railway Company do and shall and hereby agree to establish and maintain hereafter the head office of the company in the town of Whitby, and also erect and maintain during the operation of the railway, in the said town, the chief workshops of the company which may be required for the construction and repair of the company's rolling stock and

Statement.

machinery," and the establishment and maintenance for some years of such head office and workshops.

That the name of the company was changed in the year 1874 to The Whitby and Port Perry Extension Railway Company by 37 Vict. ch. 59 (O.).

That the name was again changed in the year 1877 to The Whitby, Port Perry and Lindsay Railway Company by 40 Vict. ch. 82 (O.).

That in the year 1881 the said company by agreement amalgamated with other railway companies under the name of The Midland Railway of Canada, and it was thereby provided that the chief office of the consolidated company should be at Peterboro or Toronto, which agreement, confirmed by 45 Vict. ch. 67 (O.), without the assent of the plaintiffs, reserved, however, the rights of all creditors against the companies and provided that the workshops then existing at Whitby should not be removed without the consent of the plaintiffs.

That The Midland Railway Company ceased to maintain the head office and workshops at Whitby.

That in the year 1892 by agreement The Midland Railway Company amalgamated with the defendants, the united company being responsible for all the liabilities of the several companies, which agreement was confirmed by "The Grand Trunk Act of 1893," 56 Vict. ch. 47 (D.).

The statement of defence set up that the provisional directors of The Port Whitby and Port Perry Railway Company had no power under the original charter to sign the bond, and as it was signed by the then president, although under seal, it was not the official seal of the company, the bond did not bind the company but only the provisional directors.

That The Whitby, Port Perry and Lindsay Railway became merged in The Midland Railway of Canada, ceasing to be an independent company, and it became impracticable to carry out the terms of the bond.

Statement.

That the plaintiffs did assent to the passing of 45 Vict. ch. 67 (O.) and by virtue of that statute the amalgamated company was relieved of the maintenance of the head office at Whitby, and while the assets of the several companies were continued liable to all liens or claims against them, bonds and debentures, which were a first charge and preferential claim, had been lawfully issued which would exhaust all the assets.

That no assets came to the hands of the defendants.

That the terms of the bond only required the maintenance of the workshops at Whitby while The Port Whitby and Port Perry Railway Company remained an independent line and that by its amalgamation it virtually ceased to have any separate corporate existence except for the purposes of 45 Vict. ch. 67 (O.).

- That on the amalgamation with The Midland Railway Company the business and traffic of that railway was so much in excess of The Whitby and Port Perry Railway Company that it became impracticable to maintain the head office and workshops at Whitby and it would be inequitable to compel their maintenance there.

The action was tried at Whitby on June 4th, 1900, before BOYD, C., without a jury.

*Aylesworth*, Q.C., for the plaintiffs.

*Walter Cassels*, Q.C., for the defendants.

The following cases were cited: *Bickford v. The Corporation of the Town of Chatham* (1889) 16 S.C.R. 235; *The Corporation of the City of Toronto v. The Ontario & Quebec R. W. Co.* (1892) 22 O.R. 344.

June 21, 1900. BOYD, C.:—

The obligation created by the board of the provisional directors of The Port Whitby and Port Perry Railway appears to be a corporate one, being on the successors

Judgment.

Boyd, C.

of that railway company, and by consequence on the defendants, who have acquired that road.

The obligation is under a contract to maintain the chief workshops which may be required for the construction and repair of the company's rolling stock, plant, and machinery, which, in my judgment, remains a binding engagement to this day, as it is stipulated that these shall be erected and maintained during the operation of the railway.

That road, though it forms part of a larger railway connection represented by the defendants, is still in operation, and some value is attributable to the clause as to the maintenance of workshops. Evidence was given which indicates that more than merely nominal damages may be ascertained in respect of this breach.

The provision as to the maintenance of the head office<sup>\*</sup> appears to be superseded by legislation, but the same legislation preserves the rights of the plaintiffs, *quoad* the workshops: 45 Vict., ch. 67 (O.), sec. 37, and sched., p. 263.

I have consulted many cases; the nearest are: *The Corporation of the City of St. Thomas v. The Credit Valley R.W. Co.* (1888), 15 O.R. 673; and *The Corporation of the City of Toronto v. Ontario & Quebec R.W. Co.* (1892), 22 O.R. 344.

I think the plaintiffs entitled to a reference to fix damages. Further directions and costs reserved.

G. A. B.

## RE METCALFE.

## METCALFE V. METCALFE ET AL.

*Will—Devise of Residue—Executory Devise—Event happening in part.*

A testator by his will gave his wife a life interest in his estate, and at her death after giving some specific legacies the will provided: "The residue . . . I give, devise and bequeath as follows, that is to say: it shall be equally divided between my . . . brothers"; (two) "or in case of their dying before my . . . wife it shall be equally divided between the heirs of my . . . brothers."

One of the brothers died in the lifetime of the widow and the other survived her:—

*Held*, that as the event provided for, viz., the death of both brothers during the widow's lifetime had not happened, the devise of the residue to them was not divested, and that the share of the brother first deceased passed under his will.

THIS was an appeal from the certificate of a Local Master, in an administration action.

Statement.

The appeal was argued in Weekly Court on 19th June, 1900, before FERGUSON, J.

*R. R. Hall*, for the appellant, Mary Metcalfe, the widow of Robert Metcalfe.

*Geo. J. Sherry*, for Isabella Hughes, formerly Metcalfe, a daughter of Robert Metcalfe.

*W. A. F. Campbell*, for the plaintiff and Phillip Metcalfe, William Metcalfe and Ann Moore, children of Robert Metcalfe.

*G. L. Smith*, for Harold Metcalfe and Thomas Harding, executors of Mathew Metcalfe, and R. H. Greer, administrator of Isabella Metcalfe, sister of the testator.

The facts and the portion of the will in question are set out in the judgment.

It was argued on behalf of the appellant that the exact event provided for in the will must happen, viz., the death of both Robert Metcalfe and Mathew Metcalfe in the lifetime of the widow, Louisa Metcalfe, in order to

**Argument.** divest the devise of the residue to Robert and Mathew, and the following citations were made and cases referred to: Jarman on Wills, 5th ed. 784; *Kiver v. Oldfield* (1859) 4 De G. & J. 30; *Doe d. Baldwin v. Rawding* (1819) 2 B. & Ald. 441; *Smith v. Streatfield* (1816) 1 Mer. 358; *In re Pary and Daggs* (1885) 31 Ch. D. 130; *Lillie v. Willis* (1899) 31 O.R. 198; *White v. Tindall* (1888) 13 App. Cas. 263; *Moody v. King* (1825) 2 Bing. 447; *Haskill v. Fraser* (1862) 12 C.P. 383; *Graves v. Bainbrigg* (1792) 1 Ves. Jr. 561; *Bowen v. Scowcroft* (1837) 2 Y. & C. Ex. 640; *Neysmyth v. Knowls* (1830) 1 B. & Ad. 324; *Wills v. Wills* (1875) L.R. 20 Eq. 342; *Abbott v. Middleton* (1858) 7 H.L.C. 68.

July 10, 1900. FERGUSON, J.:—

This is an appeal from a certificate of the learned Master at Peterborough regarding the construction of a clause in the will of the late Phillip Metcalfe.

- The testator having made provision for the payment of his debts and funeral and testamentary expenses gave to his wife a life interest in his estate. At her death he gave to his sister Isabella a legacy of \$500 and to his father a life annuity of \$100. The will then proceeds as follows:—

“The residue whether it be in real estate, personal property or money or securities for money, I give, devise and bequeath as follows, that is to say: It shall be equally divided between my beloved brothers Robert Metcalfe and Mathew Metcalfe, or in case of their dying before my beloved wife, Louisa Metcalfe, it shall be equally divided between the heirs of my beloved brothers, Robert Metcalfe and Mathew Metcalfe.”

The testator, Phillip Metcalfe, died on the 3rd day of June, 1867, seized of lot number ten in the eighth concession of the township of Asphodel. The assets of his estate now consist of the proceeds of a mortgage for the

sum of \$3,000 given by Robert Metcalfe upon the purchase by him of this land from the executors of the will of the late Phillip Metcalfe.

Judgment.  
Ferguson, J.

Robert Metcalfe died on the 12th day of February, 1899, leaving him surviving his widow, the defendant, Mary Metcalfe, and four children. He left a will whereby he gave all his property of every kind to his widow, the said Mary Metcalfe.

Louisa Metcalfe, the widow of the testator, Phillip Metcalfe, died on the 19th day of October, 1899. She left a will, but I do not see that it is of importance here. Mathew Metcalfe died on the first day of March, 1900. He left a will, but I do not see that it requires consideration here. Thus Robert died before the death of the testator's widow. Mathew did not, but survived her for a short time.

The learned Master has decided that in the events that have happened and according to the true construction of the will of the testator, Phillip Metcalfe, the children of Robert Metcalfe are entitled to an undivided half interest in the residue of the estate of the said Phillip Metcalfe, and that the defendant, Mary Metcalfe, the widow of the late Robert Metcalfe, to whom the said Robert Metcalfe devised and bequeathed all his property, is not entitled to any interest whatever in the estate of Phillip Metcalfe, deceased, as legatee or devisee under the will of the said Robert Metcalfe. This decision is the subject of this appeal.

With great respect I am of the opinion that this decision cannot be sustained. By the clause in question there is an unmistakeable gift of the residue to Robert Metcalfe and Mathew Metcalfe in equal shares, that is, the residue is directed to be equally divided between them. This gift must stand as good unless it is defeated in whole or in part by the executory gift to the heirs of Robert Metcalfe and Mathew Metcalfe taking effect.



Judgment.

Ferguson, J.

An executory gift is an interest that springs up of its own strength upon the happening of the prescribed event: An estate once vested will not be divested unless all the events which are to precede the vesting of a substituted devise happen. In this clause the prescribed event to happen and precede the executory gift to the heirs of Robert Metcalfe and Mathew Metcalfe is the death of these two before the death of the widow of the testator. The words are, "or in case of their dying before my beloved wife, Louisa Metcalfe," it shall be equally divided.

In the gift to Robert and Mathew the word "it" is used to describe the residue of the estate; "it" (the residue) shall be, etc. In the executory gift the same word is used: "it" (the residue) shall be, etc. In each instance the word "it" means the whole residue. There is nothing to show or indicate that the executory gift could or should take effect as to part only of the residue. Upon the happening of the prescribed event the whole residue is given to be equally divided, etc. The executory gift cannot take effect in any degree till the happening in full of the event prescribed that is to precede it, which event, in the present case is, as above stated, in my opinion, the death of both Robert and Mathew before the death of the widow of the testator, Phillip Metcalfe: there is no gift to take effect upon the death of one of these brothers before the death of the testator's widow. The will is, in this regard, perfectly silent.

Robert Metcalfe died during the life of the testator's widow. The widow is dead. Mathew Metcalfe did not die till after the death of the widow of the testator. The event upon the happening of which, the executory gift to the heirs of Robert and Mathew was to take effect did not happen or take place, and it is plain now that that event cannot ever happen, so that the executory gift can never take effect so as to divest in any degree the interests given to Robert Metcalfe and Mathew Metcalfe. The interest taken by Robert Metcalfe by this gift was the

undivided one-half or moiety of the residue of the estate of the testator Phillip Metcalfe and, assuming that this undivided half or moiety was in existence at the time of Robert Metcalfe's death, it passed under the comprehensive gift contained in his will to his widow, the defendant Mary Metcalfe.

Looking over the certificate appealed from, the admissions put in, and the elaborate notice of appeal, I think that the above virtually determines all that I am called upon to decide. The certificate will be referred back to the learned Master to the end that the necessary changes be made.

The question being one fairly and reasonably raised as to the construction of the will, the costs of the appeal will be out of the estate.

Order accordingly.

Afterwards, and before the issue of the judgment, I am asked to vary the disposition made as to the costs of the appeal. This request is made on behalf of Mathew Metcalfe's estate. Although there does appear some ground for the request, it is only shadowy, and I do not think I should be justified in departing from what I understand to be a general rule. The disposition as to the costs will therefore stand.

G. A. B.

Judgment.

Ferguson, J.

## RE WRIGLEY ESTATE.

*Will—Bequest of Personality to Legatees, "or their Heirs, Executors or Assigns"—Death of Legatee in Lifetime of Testator—"Heirs," Meaning of—Next-of-kin.*

A testator by his will, after a provision in favour of his wife for life, directed that "at the death of my beloved wife . . . any money that may then be remaining . . . shall be equally divided and paid to" certain nephews and nieces, naming them, "or their heirs, executors, or assigns." One of the nieces predeceased the testator, leaving a husband and children :—

*Held*, that the gift to the deceased niece did not lapse, and that her heirs entitled to her share, were those persons who would have taken her personal property under the statute of distributions in case of her dying intestate possessed of personal property.

## Statement.

THIS was an application by way of notice of motion under rule No. 938 for the construction of a clause in the will of one William Wrigley, which, with the material facts, is set out in the judgment and which was argued in Chambers on June 22nd, 1900, before Ferguson, J.

*F. Langmuir* appeared for The Toronto General Trusts Corporation,\* trustees, on whose behalf the notice was given.

*Edgar* for John Thomas Wrigley appointed to represent the next of kin of the testator, contended that the words in the will "or their heirs, executors or assigns" merely showed that the legacy vested immediately upon the testator's death, even if the legatee died before the period of distribution; that there being an intervening life estate, and no gift other than that contained in the direction to pay, those words were necessary to show that the legacy was intended to vest; and that had there been no intervening life estate the heirs, executors or assigns would have taken by substitution for the original legatee who predeceased the testator: *Corbyn v. French* (1799) 4 Ves. 418 at pp. 434 435, and *Jarman on Wills*, 5th ed. pp. 1581-1583.

\*The name of the Toronto General Trusts Company, as designated in the will, had been changed to The Toronto General Trusts Corporation.—Rep.

*Harcourt* for the infant children of Annie Lohead, the deceased legatee, contended that the legacy did not lapse, and that Annie Lohead's children took her legacy under the definition "heirs," and as the legacy was personalty, the word "heirs" should be interpreted to mean, "next of kin," citing *Gittings v. McDermott* (1833) 2 M. & K. 69 at p. 76, 2 L. J. Ch. N. S., 212; *Re Porter's Trust* (1858) 4 K. & J. 188 at p. 193.

*Milliken* for the husband of Annie Lohead in the same interest.

*Edgar*, in reply, contended that this case differed from *Gittings v. McDermott* and *Re Porter's Trust*, as in those cases the word "heirs" only was used, whereas here the words "executors or assigns" also appeared which made the substitutional gift too indefinite to take effect.

July 10th, 1900. FERGUSON J.:—

The case comes before the Court by way of an originating summons, asking for the construction of a clause in the will of the late William Wrigley.

The testator having made some gifts directed in effect that all his remaining property should be converted into cash by his executors, and that the money should be deposited in the hands of the Toronto General Trusts Company, the same to bear interest at the best rates that could be obtained, and that his widow should receive from the company the sum of \$300 per annum to be paid by monthly instalments, the payments to be continued and paid to her during the term of her natural life, or for so long a time as the amount of money on deposit might remain unexhausted.

The clause of the will then proceeds:—"At the death of my beloved wife, Alice Olive Wrigley, any money that may then be remaining in the hands of the Toronto General Trusts Company aforesaid shall be equally divided and paid to my nephews, Christopher Wrigley and William

Judgment.

Ferguson, J.

Wrigley, sons of my late brother, John Wrigley, and my nieces, Sarah Jane Wrigley, now Sarah Jane Holden, and Annie Wrigley, now Annie Lohead, daughters of my late brother, John Wrigley, 'or' their heirs, executors or assigns."

Letters probate of the will were granted and the company took upon themselves the burden of the trusts.

The amount of cash in the hands of the trustees has been by them divided into four shares of \$1,476.86 each, and the shares of Christopher Wrigley, William Wrigley and Sarah Jane Wrigley, referred to as Sarah Jane Holden, have been duly paid, and in respect of the same the company discharged. Annie Lohead predeceased the testator and left her surviving her husband, Charles James Lohead, and two children under the age of twenty-one years, Alvina Lohead and Laura Lohead.

She died intestate and no letters of administration of her estate have been granted. These infant children of Annie Lohead claim to be entitled to their mother's share in the estate of the said William Wrigley as being the "heirs" referred to in the will; and Charles James Lohead also claims to be entitled to an interest in the distributive share which would have been received by his deceased wife.

It is also claimed on behalf of the next of kin of the testator, William Wrigley, that the said share or legacy to Annie Lohead lapsed by reason of her death prior to the death of the testator, and that the said legacy is distributable amongst the next of kin of the said William Wrigley deceased (the testator).

The testator left no children and his wife referred to in the will died intestate in or about March, 1894.

By the notice of motion I am asked to say whether or not the share or legacy of Annie Lohead lapsed by reason of her death before the death of the testator, and whether or not there is an intestacy in regard to the subject of this legacy.

2. Are the children of Annie Lohead as her heirs entitled to the share or legacy to which their mother would have been entitled if she had survived the testator and life tenant?

Judgment.

Ferguson, J.

3. Are the husband and children of the said Annie Lohead entitled as her next-of-kin to have divided among them the share or legacy to which she would have been entitled if she had survived the testator and life tenant?

4. If it is held that there is an intestacy or lapse in regard to the share that Annie Lohead would have been entitled to in the event of her surviving, then who are entitled to the said share?

The first, indeed the main, question to be considered is whether or not there was a lapse of the legacy given to Annie Lohead.

The head note of the case *Gittings v. McDermott* (1833), 2 M. & K. 69, decided by the Lord Chancellor in appeal from the Master of the Rolls, is: "A testator gave to the children of his sister . . . whose names he enumerated, 'or to their heirs,' certain legacies. Three of the children died in the lifetime of the testator. Held, that the legacies to these children did not lapse, but that their next-of-kin took by substitution at the death of the testator.

"The same testator gave all the residue of his property 'in equal shares to each of his two sisters (naming them), and upon their deaths respectively to their heirs.' Both sisters died in the lifetime of the testator. Held, that their next-of-kin . . . living at the death of the testator were entitled by substitution to the gift of the residue."

In dealing with the case the learned Judge said, at p. 75: "The force of the disjunctive word 'or' is not easily to be got over. Had it been "and" the words of limitation would, of course, as applied to a chattel interest, have been surplusage; but the disjunctive marks as plainly as possible that the testator, by using it, intended to provide for an alternative bequest, namely, to the legatees, if they should survive, and if they should not, to their heirs."

Judgment.

Ferguson, J.

The Lord Chancellor further on in his judgment points out that the substitution is sufficiently distinct, and that the use of the word "heirs" in dealing with personalty does not create an ambiguity and that it designates the heir of the personalty, that is the next-of-kin, and refers to several cases in which this has been decided.

The Lord Chancellor said: "I have, therefore, no doubt that the words provide with sufficient distinctness a substitute for the legatee, if it be admitted that the event of her predecease appears to have been in the testator's contemplation"; which the learned Judge said did appear upon a reasonable construction of the words, p. 76.

The case *Corbyn v. French* (1799) 4 Ves. 418, was relied on in the argument. There was there a bequest of the residue to A. for life; and after her death legacies were given to B., or to her proper representative, in case she should not be living at the decease of A., and there were gifts to four other persons, or their representatives or representative; and one of the four died in the lifetime of the testator, and another survived him, but died in the lifetime of A.; the gift to the former lapsed, the gift to the latter vested.

In *Gittings v. McDermott* the Lord Chancellor refers to that case and points out the difference between it and the case he had in hand, such difference being the use by the testator of the words "to B., or to her proper representative if B. should not be living at the widow's death," p. 77, showing that what the testator had in his mind was the death of the legatee before the death of the life tenant, and not the death of the legatee before his, the testator's, own death, and the legacy to the one who died in the testator's lifetime lapsed, but the legacy to the one who survived the testator and died before the death of the life tenant did not.

The case *Corbyn v. French* was in this respect quite different from the case before the Lord Chancellor (*Gittings v. McDermott*) and I venture to think that it is very different in some respects from the present case, the gift in

which, so far as now of importance here, is in effect simply a positive direction that at the death of the life tenant payments shall be made to Annie Lohead or her heirs, executors or assigns, without any reference to whether or not she should die during the lifetime of the tenant for life or, so far as I am able to perceive, anything to indicate that this and not her death during his own life, was in the mind of the testator when he used the words "'or' their heirs, executors or assigns."

Judgment.  
Ferguson, J.

In the case *Re Porter's Trust* (1858), 4 K. & J. 188 both the foregoing cases are referred to by Vice-Chancellor Sir W. Page Wood. In that case there was a bequest of the residue to A. for life, and at her death a legacy to B. "or his heirs." Held, that the legacy to B. did not lapse by reason of his death in the lifetime of the testatrix, but that his widow and only child took by substitution. This appears to me to bear somewhat more than a strong resemblance to the present case.

In the concluding part of his judgment the learned Vice-Chancellor says, "but, if instead of 'personal representatives,' the word 'heirs' be used, as here it is used, I apprehend that circumstance shews an intention on the part of the testator that the persons he designates as 'heirs' are to take by way of substitution whenever B. may die, and the bequest will not lapse although B. may die in the lifetime of the testator." p. 198.

I have examined the various authorities referred to on the argument and considered the clause of the will as well as I have been able, and I have arrived at the conclusion that there was not a lapse of the gift to Annie Lohead and that her "heirs" are entitled to the money to which she would have been entitled had she survived.

Then as to the heirs so entitled. The word "heirs" is, I think, to be considered and construed as in the "setting" in which it is found. In the present case the words are "her heirs, executors, or assigns." Looking at this expression employed by the testator I think it would not be right



Judgment.  
Ferguson, J.

to say that he used the word "heirs" in a strictly technical sense. The use of the word "executors" side by side with it, and the use of the disjunctive word "or" seem to me to deprive the word "heirs" of the strictly technical meaning, and I arrive at the conclusion that those who are entitled to the money that Annie Lochead would have been entitled to had she survived are such persons as would have been entitled under the statute of distributions to succeed to her personal property in case she, Annie Lochead, being possessed of personal property, had died intestate. This was the view stated by Sir Page Wood in the above case before him.

If I am right in this conclusion it does not seem needful to pursue the matter further or say anything more about the will or the case presented.

The costs, following the usual rule, will be out of the fund, that is, the share in question. The trustees will have their costs "solicitor and client" in the usual way.

G. A. B.

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### CARSCALLEN V. WALLBRIDGE, ET AL.

#### *Election—Husband and Wife—Separation Deed—Benefits under Husband's Will.*

A husband in a separation deed covenanted to pay his wife an annuity of \$200 as follows: \$100 on the 1st of June and December in every year; and charged it on certain land, the wife accepting it in full satisfaction for support, maintenance and alimony during coverture, and of all dower in his lands then or thereafter possessed.

The husband by his will, subsequently executed, directed his executors to pay his wife \$400 annually: \$200 on the 1st of June and December in each year during her life, and added, "which provision in favour of my said wife is made in lieu of dower":—

*Held*, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both.

Statement.

THIS was an action brought by the executor of a wife against the executors of her husband, claiming the benefit of a provision in her favour in a separation deed, and also a

legacy under his will, under the circumstances set out in the judgment.

Statement:

The action was tried at Belleville, on June 21st, 1900, before STREET, J., without a jury.

*M. Wright*, for the plaintiff, claimed the benefit of the provision in the deed and the legacy, and cited *Wilkinson v. Joughin* (1866), L.R. 2 Eq. 319; *Heath v. Dendy* (1826), 1 Russ. 543; *Moore v. McGrath* (1774), 1 Cowp. 9; *Barratt v. Wyatt* (1862), 30 Beav. 442; *Gwyn v. The Neath Canal Navigation Co.* (1868), L.R. 3 Ex. 209; *Neame v. Moorsom* (1866), L.R. 3 Eq. 91; *Howard v. Earl of Shrewsbury* (1874), L.R. 17 Eq. 378; *Walsh v. Trevanion* (1850), 15 Q.B. 733; *Jenner v. Jenner* (1866), L.R. 1 Eq. 361; *Ramsden v. Hylton* (1751), 2 Ves. Sr. 304; *The Directors, &c., of the London and South-Western R.W. Co. v. Blackmore* (1870), L.R. 4 H.L. 610; *Bartlett v. Gillard* (1826), 3 Russ. 149.

*Northrup*, for the defendants, contended that the provision in the deed was literally performed by the will, and even if not performed, the legacy was a satisfaction, and the plaintiff must take under the will alone, the rule being that if the legacy is charged on different lands, or payable in different ways, the legatee is not put to her election. Here the annuity given by the deed was charged on certain lands and the legacy was not; and, as the legacy was a first charge on the whole estate of the deceased husband, and it was only the residue, after payment of the legacy that was disposed of, that rule did not apply, and cited *In re Fletcher, Gillings v. Fletcher* (1888), 38 Ch. D. 373; *Blandy v. Widmore* (1715), 2 Vern. 709; 1 P. Wms. 324; *Lee v. Cox* (1746), 3 Atk. 419; *Barret v. Beckford* (1750), 1 Ves. Sr. 519; *Garthshore v. Chalie* (1804), 10 Ves. 1.

Judgment.

July 10th, 1900. STREET, J.:—

Street, J.

The plaintiff is the executor of the estate of Ellen Leonard, deceased; the defendants are the executors of the estate of William Leonard, deceased, who was the husband of the said Ellen Leonard, and predeceased her.

William Leonard and Ellen Leonard entered into a separation deed on 16th November, 1882, and lived apart from that time until their death; he died 21st March, 1898; she died 15th September, 1899.

By the terms of the deed he covenanted with her to pay to her or her assigns, during her life, for or towards her better support and maintenance, an annuity of \$200, as follows, \$100 on the 1st days of June and December in every year, and charged it upon the west half lot 3, 2nd con., Marmora, and she agreed to accept the same in full satisfaction for her support and maintenance and all alimony whatsoever during her coverture, and of all dower or thirds which she might have in any lands or real estate of her husband, which he then possessed or at any time thereafter might own or possess.

William Leonard, by his will, made long after the execution of this deed, amongst other things, provided as follows:—"I direct my said executors to pay to my wife, Ellen Leonard, the sum of \$400 annually, \$200 of which to be paid on the 1st of June and \$200 on the 1st of December in each year during the life of my said wife, *which provision in favour of my said wife, is made in lieu of dower.*"

The question raised by the present action is whether this legacy is to be taken to operate as a satisfaction of the debt to his wife created by the contract in the separation deed by putting her to her election between the will and the deed. It is contended by the plaintiff that the words "which provision in favour of my said wife is made in lieu of dower" take the case out of the general rule which, were it not for those words, would undoubtedly require

me to hold that the widow was put to her election between her rights under the deed and under the will.

Judgment.

Street, J.

In my opinion it is clear that she was entitled to both benefits and was not put to her election between them. She is put to an election in plain terms by the will, but it is not one between her rights under the deed and under the will, but between her rights to dower in his land and her right to the legacy under the will, and she could elect in favour of the legacy therefore without bringing into question her right to enforce the covenant in the deed. It is true the election was one which was easy to make because if she elected against the will she would be confronted by the agreement in the deed to release her dower, but that is beside the question. The testator has stated explicitly that if she agrees not to claim dower in his lands she is to have the legacy and has thereby excluded the presumption that the legacy was intended to quench the covenant.

There will be a declaration, therefore, that the plaintiff is entitled to recover both under the deed and the will. The amount may be computed by the local registrar.

The costs of both parties should be paid out of the estate in the hands of the defendants as the litigation is due to the ambiguous terms of the will.

G.A.B.

## NELSON ET AL. V. BELL ET AL.

*Trusts and Trustees—Sale of Land—Approval of Court—R.S.O. 1897, ch. 129, sec. 39—Con. Rule 938.*

Trustees having unsuccessfully offered for sale estate property consisting of a block, consisting of hotel and stores and a dock together, and subsequently the hotel and stores together, received an offer for the hotel by itself:—

*Held*, on an application to the Court to approve and confirm the sale under R.S.O. 1897, ch. 129, sec. 39, and Con. Rule 938, sub-sec. (f), that the Court had jurisdiction to express its approval, and under the circumstances it was a case in which the jurisdiction ought to be exercised.

**Statement.**

THIS was an application by the trustees of the will of the late Alexander Crawford for the approval of the Court of a proposed sale of part of the real estate of the testator.

The application was argued in Court on July 10th, 1900, before MEREDITH, C.J.

*W. H. Blake*, for the trustees.

*John Hoskin*, Q.C., for the infant.

The widow was not represented.

It was shewn to the Court that the trustees had power to sell under the will; that a large portion of the estate consisted of what was known as The Crawford block and dock at Windsor; that efforts by advertising, employment of real estate agents, and negotiations with proposed purchasers, had been made to sell the block and dock together; and then the block, which consisted of a hotel and stores, by itself, which had not resulted in a sale advantageous to the estate; that the estate was getting into an unsatisfactory condition, for the reason that there was not sufficient income to pay the annual charges and repair, and put the hotel in a proper condition to be satisfactorily leased, and that a cash offer of \$20,460 had been made for the hotel by itself, which was considered a good offer and one which would be to the advantage of the estate to accept.

July 18th, 1900. MEREDITH, C.J. :—

Judgment.

Meredith, C.J.

By the terms of the will the trustees are invested with authority to sell the real estate of the testator, except one parcel—not that which it is now proposed to sell—and the time and price and terms of sale are in the discretion of the trustees.

It is clear, upon the material before me on the motion, that it is necessary that a sale of the property proposed to be sold should be made, and the price and terms of sale are shewn to be the best that can be obtained.

I conclude, therefore, that the trustees will exercise a wise discretion in carrying into effect the proposed sale.

The only point which I desired to consider was whether the case is one in which the Court can and ought to act, in expressing its approval under the provisions of R.S.O. 1897, ch. 129, sec. 39 and Con. Rule 938, sub-sec. (f), and upon consideration I have come to the conclusion that the Court has the jurisdiction which it is asked to exercise, and that the case is one in which that jurisdiction ought to be exercised. See *In re Robinson Picard v. Wheeler* (1885), 31 Ch.D. 247.

An order may therefore go declaring the approval of the Court to what is proposed to be done as a proper exercise by the trustees of the trusts and powers of the will.

The costs of the trustees and of the official guardian, the former between solicitor and client, may be paid out of the estate.

G. A. B.

## GRAND TRUNK R.W. CO. V. CITY OF TORONTO.

*Constitutional Law—Railways—Municipal Corporations—Construction of Highway Across Railway—Railway Committee of Privy Council—Railway Act of Canada, sec. 14—Intra Vires.*

In an action to restrain the defendants from acting upon an order of the Railway Committee of the Privy Council, made under sec. 14 of the Railway Act of Canada, giving them the option to open a new street, by means of a subway, across the property and under the tracks of a Dominion railway company, but without compensation, and requiring the company to pay a portion of the cost of construction, and meanwhile allowing a temporary crossing for foot passengers only, and making certain other provisions upon the subject:—

*Held*, that the Provincial Legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question.

2. It has conferred such capacity.
3. In virtue of its power over property and civil rights in the Province, the Provincial Legislature has power to authorize a municipality to acquire and make such a street, and to provide how and upon what terms it may be acquired and made.
4. But that power is subject to the supervision of federal legislation respecting works and undertakings such as the railway in question.
5. The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislation.
6. Such legislation may rightly confer upon any person or body the power to determine in what circumstances, and how and upon what terms, such a street may be acquired and made, or to prevent the acquiring and making of it altogether, and therefore sec. 14 of the Railway Act is not *ultra vires*.
7. Such legislation, in virtue of its power over such railway corporations, as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs, and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the Railway Committee, under sec. 14, in such a case as this.
8. Such legislation has not conferred upon the Committee power to give the temporary foot-way in question.
9. Nor any authority to delegate its powers.
10. The work it directs must be constructed under the supervision of an official appointed for that purpose by the Committee.
11. The Railway Company may, if they choose, construct the works directed, under such supervision, instead of permitting the municipality to do so.

## Statement.

MOTION by the plaintiffs for an interim injunction restraining the defendants from constructing a temporary crossing over the plaintiffs' property and their railway constructed thereon between Lansdowne avenue and North Lansdowne avenue, in the city of Toronto, and from trespassing upon the property for such purpose, and

to restrain the defendants from acting upon an order made by the Railway Committee of the Privy Council of Canada, upon the application of the defendants, allowing a crossing to be made upon certain terms and conditions. The facts are stated in the judgment.

Statement.

The motion, coming on for hearing before MEREDITH, J., in Court, on the 17th May, 1900, was turned by consent into a motion for judgment, and argued as such.

*H. S. Osler*, for the plaintiffs. The Railway Committee has no power under sec. 14 of the Railway Act to make the order. Instead of directing streets to be laid out, it has merely decided what would be convenient. It has no power to direct a temporary crossing; this is clear by analogy to what may be done under sec. 187: see *Corporation of Parkdale v. West* (1887), 12 App. Cas 602; *Hendry v. Toronto, Hamilton, and Buffalo R.W. Co.* (1895), 26 O.R. 667. Even if the order is properly made under sec. 14, it cannot give the public any right of travel; the works constructed under it remain the property of the company. The city must take proper proceedings to make a street under the Municipal Act so as to make roads north and south of the tracks meet before such rights accrue, and this would cast the care of the road upon the municipality and compel compensation to be made.

*Fullerton*, Q.C., for the defendants. The order was proper. The plaintiffs hold their land under the authority of the Parliament of Canada, and not under Provincial legislation, and a passage across the track can only be obtained under the authority delegated to the Railway Committee, and cannot be enjoined by virtue of a provincial enactment, and the Committee may make the land of a company a street and also unmake it: see secs. 11, 18, 17, 20, and 21, and *McArthur v. Northern and Pacific Junction R.W. Co.* (1890), 17 A.R. 86. There is no power in the Ontario Legislature to order an entry or expropri-



## Argument.

ation of land of a Dominion railway company; all that can be obtained is a right to cross the track from the Railway Committee. The city corporation are not bound to expropriate where, as here, the language of sec. 14 is plain and clear. He referred to Elliott on Roads and Highways, pp. 143, 145, 166 note, and 170, and to *Tennant v. Union Bank*, [1894] A.C. 31.

August 29, 1900. MEREDITH, J. :—

This action came on for hearing before me on the 17th day of May last, upon a motion made by the plaintiffs for an order enjoining the defendants from acting upon the order of the Railway Committee of the Privy Council of Canada in question in the action, which I shall presently read, until the trial of the action in due course.

Upon that application an order would at once have been made merely enlarging it until the trial, as the balance of convenience seemed to me in favour of not interfering pending the trial, and so the case would have proceeded in the usual course of practice, and come on for trial at the autumn sittings of the Court at Toronto; but, on the request of counsel for the defendants, joined in, though rather grudgingly, by counsel for the plaintiffs, I gave leave to the parties to adopt the somewhat unusual course of turning the application for the temporary order into a motion for final judgment, and the case now stands to be disposed of accordingly; although I have found the ordinary difficulties of dealing with it considerably increased by that course, there being, substantially speaking, no evidence, nor indeed any pleadings even, before me.

The case raises several questions of a somewhat complicated and certainly difficult character, involving the demarcation of the line between federal and provincial powers of legislation in respect of the matters in question, as well as the now somewhat frequently litigated question of the powers of the Railway Committee before mentioned, in the like matters.

Upon an application made by the defendants to that Committee, under sec. 14 of the Railway Act, 51 Vict. ch. 29 (D.), which is in these words:—

Judgment.  
Meredith, J.

“14. Whenever, after due notice of application therefor, the Railway Committee decides that it is necessary in the interest of any municipality that means of drainage should be provided, or lines of water pipes or other pipes should be laid, or streets made through, along, across or under any works or lands of the company, it may, after hearing the parties, direct how and on what terms such drainage may be effected, or water pipes or other pipes laid or streets made; and thereupon such municipality may construct the works necessary to carry out such direction, but only under the supervision of such official as the Railway Committee appoints,—or at its option the company may construct such works under the like supervision; and the cost of constructing such works, the cost of supervision, and the continued maintenance of the same shall be paid by such municipality, unless the Railway Committee direct that the company bear some proportion thereof,—in which case the company shall bear such proportion as the Railway Committee decides.”—

they made the order in question; which is in these words:—

“The corporation of the city of Toronto, hereinafter called ‘the city,’ having applied to the Railway Committee of the Privy Council of Canada for an order authorizing the extension of the Lansdowne avenue in that city across the tracks of the Grand Trunk and Canadian Pacific Railway Companies.

“The said Committee, having on several occasions heard counsel for the city and the said

Judgment.

Meredith, J.

railway companies respectively, and having duly considered the evidence submitted on their behalf, hereby orders and directs that the city may have a temporary crossing, at rail level, for foot passengers only, over the said tracks at the said place as shewn on the plans submitted and filed in the office of the Committee, up to and including the 20th day of February, A.D. 1900, on the following conditions, that is to say :—

“The city shall, at its own cost, provide and keep a watchman at this crossing day and night, and shall make the approaches and crossing safe for the travelling public before the crossing is used for traffic.

“The city shall, at its own cost, comply with section 197 of the Railway Act, as amended by 55 & 56 Victoria chapter 27, section 6.

“The said Committee further directs that, after the said 20th day of February, A.D. 1900, all crossing at the said place shall be discontinued, unless the city shall, prior to such date, elect to construct a permanent sub-way in lieu of such crossing at rail level, and shall satisfy the Committee that *bonâ fide* and reasonable progress is being made in the construction of such sub-way; in which event the Committee will, at the expiration of such period, grant an extension of time for the continuation of the temporary crossing at rail level, whilst the construction of such sub-way is being prosecuted with such despatch as shall be satisfactory to the Committee. The details, plans of such sub-way, and the works of construction thereof, to be approved by the Government Chief Engineer of Railways and Canals, and the cost of such sub-way, including all consequential damages, costs, charges, and expenses in connection therewith, to be borne

one half by the city and the other half by the two companies equally."

Judgment.

Meredith, J.

Upon an appeal to the Governor-in-Council, under sec. 21 of the Act, the time mentioned in the order was extended until the 20th day of September next, but the order in other respects was affirmed.

The broad question is :—

Had the Committee power to make that order?

And, as it seems to me, that broad question can best be solved by considering :—

1. Whether the defendants had corporate capacity to acquire and make a new street across a Dominion railway.

2. If so, whether the Parliament of Canada had power to confer upon the Railway Committee authority to make the order in question. And

3. If so, whether it has conferred such power.

The defendants are a provincial municipal corporation created by, and acquiring all their power under, Provincial legislation.

By virtue of such creation and existence alone it can act. Federal legislation has no power over it in that respect.

If Provincial legislation has not given the defendants the legal capacity to acquire and make new streets across Dominion railways, the Parliament of Canada cannot confer that capacity upon them.

And if Provincial legislation has conferred that capacity upon them only upon their paying compensation for the right to cross, they can cross only upon so paying. Dominion legislation cannot confer the capacity without the condition : see *Graham v. Cunandaigua Lodge* (1893), 24 O.R. 255 at pp. 261-2.

The Municipal Act must, therefore, be first turned to, to learn whether the defendants had corporate capacity to acquire the thing they sought.

By sec. 637 general power is given to such a municipality to open highways, and enter upon and take any land

Judgment.

Meredith, J.

necessary or convenient for that purpose ; and that section would, no doubt, be broad enough to confer upon them capacity to acquire and make the proposed street in question but for sec. 640, sub-sec. 2. That sub-section expressly deals with the subject of crossing railways, and confers the power to do so, and so, I think, must be looked to for the power sought to be exercised by the defendants.

The sub-section is in these words:—

“Roads crossing railways and railway lands.

“2. For establishing, opening, making, preserving, improving, maintaining, widening, enlarging, altering, diverting or stopping up within the limits of the municipality, any highway, through, over, across, under, along, or upon the railway and lands of any railway company, and for entering upon, breaking up, taking or using any such land in any way necessary or convenient for the said purpose; but subject to the provisions contained in the Railway Streets and Drains Act, and provided that the highway is within the jurisdiction of the Council. 55 V. c. 42, s. 550 (2).”

It clearly gives the power claimed, unless the power given by it is limited to the crossing of provincial railways by reason of the latter words “but subject to the provisions contained in the Railway Streets and Drains Act;” (the application of which Act is limited to railways and railway companies in respect of which the Legislature of Ontario has authority to enact the provisions of it; they could not rightly be made applicable to Dominion railways.)

If it were so limited, then I would be of opinion that the defendants had not corporate capacity to acquire the proposed street, but I am of opinion that it is not so limited; that the latter part of the section applies only to the acquiring of rights over provincial railways, and in regard to Dominion railways there is no restriction contained in the Municipal Act, unless it be under sec. 437, which provides that:—

“ Compensation for lands taken or injured.

Judgment.

Meredith, J.

437. Every council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken or used by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of its powers, due compensation for any damages, (including cost of fencing when required) necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act. 55 V. c. 42, s. 483, *part.*”

Then, is payment of compensation as the Act provides a condition upon the performance of which only the municipality has capacity to acquire?

That can hardly be the effect of this section. It cannot have been intended that the municipality cannot acquire without compensation, where, under competent legislation, those who would otherwise have been entitled to it have been deprived of all right to it, and a different mode of dealing with the subject has been adopted.

Even in cases where the section applies, payment of compensation has not been considered a condition precedent to the right of entering upon and taking the land: see *Stonehouse v. Township of Enniskillen* (1872), 32 U.C.R. 562; and *Harding v. Township of Curdiffe* (1881), 29 Gr. 308, and in appeal (1882), 2 O.R. 329.

I am of opinion that the defendants had legal capacity and power to acquire and make the proposed street, under Provincial legislation.

Then, had the Parliament of Canada authority to impose the restrictions, upon that power, so conferred, contained in the Railway Act, and to impose the terms in respect of it contained in the order in question?

I think it had.

Judgment.

Meredith, J.

Such power rests somewhere, either in the Parliament of Canada or in the Legislative Assembly of the Province.

Public interests, and public safety, require that the right to carry a new street, across such a railway, shall be withheld until the proper safeguards, for those lawfully using such highways, are provided. The Legislative Assembly seems to have thought that those seeking the new way should be at the whole expense of it, but Parliament has provided that part of it may be imposed upon the railways, which take the burden without, generally speaking, getting any advantage.

And the plaintiffs are a corporation subject to the control of Dominion legislation, and they own a great highway which, under the B.N.A. Act, is a work or undertaking excluded from provincial legislative power, and put within the exclusive legislative power of the Parliament of Canada: see secs. 91 and 92 (10): see also the Railway Act, sec. 306.

And I know of no reason why Parliament might not confer upon any person, or body, the power conferred upon the Railway Committee by the section of the Act under which the order in question was applied for and made.

The second question must, therefore, be answered in favour of the defendants.

The last question, whether the Railway Committee has exceeded the power conferred upon it, is the one which has presented the greatest difficulties to my mind.

The application to the Committee was made by the defendants for leave to make a new street across the plaintiffs' tracks, and through their land, under sec. 14 of the Act.

I again read that section, substantially in its own words, omitting only so much of it as provides for other things than streets:—

“Whenever, after due notice of application therefor, the Railway Committee decides that it is necessary that streets should be made across,

or under, any works or lands of the company, it may, after hearing the parties, direct how, and on what terms, such streets may be made; and, thereupon, such municipality may construct the works necessary to carry out such direction, but only under the supervision of such official as the Railway Committee appoints; or, at its option, the company may construct such works, under like supervision; and the cost of constructing such works, and the cost of supervision, and the continued maintenance of the same, shall be paid by such municipality, unless the Railway Committee direct that the company bear some proportion thereof, in which case the company shall bear such proportion as the Railway Committee decides."

Judgment.  
Meredith, J.

I can perceive no reason why these words do not apply to the case of acquiring new highways, as well as making a street of a highway already existing,—there being in this Province such things as highways by statute, although never opened or travelled upon: see sec. 598 of the Municipal Act—and so they are applicable to the proposed street in question.

Then, an application having been duly made, in manner provided for in the section, three things are plain. The Committee had power:—

1. To decide whether it was necessary in the interests of the municipality that the proposed street should be made, and to direct how and on what terms it might be made; and, having decided that it should be made, and directed how and in what terms,—

2. The municipality might thereupon construct the work necessary to carry out such directions, but subject to these conditions:

3. That the construction of the work must be under the supervision of such official as the Committee should appoint, and that the railway company should have the



**Judgment.**

**Meredith, J.**

option of constructing the works, that is, of taking the work out of the hands of the municipal corporation and doing it themselves, but only under the like supervision.

I now read again the order, as affirmed, in question, bearing in mind these powers and rights.

“The corporation of the city of Toronto, hereinafter called ‘the city,’ having applied to the Railway Committee of the Privy Council of Canada for an order authorizing the extension of the Lansdowne avenue, in that city, across the tracks of the Grand Trunk and Canadian Pacific Railway Companies.

“The said Committee having on several occasions heard counsel for the city and the said railway companies respectively, and having duly considered the evidence submitted on their behalf, hereby orders and directs that the city may have a temporary crossing, at rail level, for foot passengers only, over the said tracks at the said place as shewn on the plans submitted and filed in the office of the Committee, up to and including the 20th day of September, A.D. 1900, on the following conditions, that is to say:—

“The city shall, at its own cost, provide and keep a watchman at this crossing day and night, and shall make the approaches and crossing safe for the travelling public before the crossing is used for traffic.

“The city shall, at its own cost, comply with section 197 of the Railway Act, as amended by 55 & 56 Vict. chapter 27, section 6.

“The said Committee further directs that after the said 20th day of September, A.D. 1900, all crossing at the said place shall be discontinued, unless the city shall, prior to such date, elect to construct a permanent sub-way in lieu of such crossing at rail level, and shall satisfy the

Committee that *bonâ fide* and reasonable progress is being made in the construction of such sub-way; in which event the Committee will, at the expiration of such period, grant an extension of time for the continuation of the temporary crossing at rail level, whilst the construction of such sub-way is being prosecuted with such despatch as shall be satisfactory to the Committee. The details, plans of such sub-way, and the works of construction thereof, to be approved by the Government Chief Engineer of Railways and Canals, and the cost of such sub-way, including all consequential damages, costs, charges, and expenses in connection therewith, to be borne, one-half by the city and the other half by the two companies equally."

Judgment.

Meredith, J.

The Railway Committee, being a creature of statutory origin and endowment only, can exercise only such powers as are by statute conferred upon it. If it do not appear, with reasonable clearness, from some statute, that it has the power it exercises, or proposes to exercise, that power cannot be rightly exercised.

Now, the first thing observable is, that, though the section provides for making a street only, and the application was for leave to do so only, the order in the first place authorizes a temporary crossing for foot-passengers only. That order, I think the Committee had no power to make. It could act upon the application of the municipality only, and the application could not, under sec. 14, be for leave to construct a foot-way of a temporary character only, but must have been for leave to construct a street, which is generally described as "a paved way with houses on both sides."

It may, however, be contended that under some other legislation the Committee had the power which they assumed.

Judgment.

Meredith, J.

To that contention it would be enough to say, that the application was not made under any other legislation, but was made under sec. 14, and for a new street only, and the right of the Committee is not to act of its own motion, but upon an application in such, and the like, matters: see sec. 11.

But no such other legislation has been referred to, and I am aware of none.

Under sec. 11 the Committee has power to hear and determine any application, complaint, or dispute respecting any right of way over land owned or occupied by any railway company, and respecting any highway or street over any such land. But that section appears to me to have application to existing things only, and does not confer power to give a new right of way, highway or street, to any one who may apply for it, much less to those who do not. It would need much clearer words to confer any such extraordinary power. Under sec. 11, the Committee's powers are of a judicial character; it shall have power to inquire into, hear and determine, any application, complaint, or dispute. If such powers were conferred upon a court or judge, it would hardly be contended that they included the power to give new rights of way, highways or streets, to any applicant, upon or out of the company's private property, without restriction.

Mr. Fullerton relied on sub-sec. (h) of sec. 11, but that applies to the case of a railway crossing an existing highway, not a new highway crossing an existing railway.

I am of opinion that the order in respect of the foot-passage is *ultra vires* of the Committee.

And the next thing noticeable is the departure from the positive requirements of the section that the construction of the works must be overseen by an official appointed by the Committee. The Committee has no power to absolve anyone from that supervision; nor has it power to delegate to any official, or person, its own powers. It cannot leave the questions whether the crossing is necessary, or how, or

upon what terms, it may be made, to the will of any other body or person. Those questions must be determined by the Committee itself. But the oversight of the construction of the works which the Committee directs, by an official to be appointed by it (presumably in the public interests and for the safety of the public using either road), must be committed to such official.

Judgment.

Meredith, J.

It does not plainly appear from the order, and there is no evidence on the subject, whether that which the Committee did, was to delegate any of its power, or merely to give the supervision of the construction to the chief engineer. The plaintiffs are entitled to require that no more, and no less, than supervision shall be exercised by him.

And, lastly, there is no provision in the order for leave to the plaintiffs to construct the works, nor any evidence whether that option has been given or refused to the plaintiffs. They are entitled to it.

Therefore, in my opinion, shortly stated :—

1. The Provincial Legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question..

2. It has conferred such capacity.

3. In virtue of its power over property and civil rights in the province, the Provincial Legislature has power to authorize a municipality to acquire and make such a street, and to provide how and upon what terms it may be acquired and made.

4. But that power is subject to the supervision of federal legislation respecting works and undertakings such as the railway in question.

5. The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislation.

6. Such legislation may rightly confer upon any person or body the power to determine in what circumstances,

Judgment.

Meredith, J.

and how, and upon what terms, such a street may be acquired and made, or to prevent the acquiring and making of it altogether, and therefore sec. 14 of the Railway Act is not *ultra vires*.

7. Such legislation, in virtue of its power over such railway corporations, as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs; and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the Railway Committee, under sec. 14, in such a case as this; which power has been exercised to some extent by such Committee in this case.

8. Such legislation has not conferred upon the Committee power to give the temporary foot-way in question.

9. Nor any authority to delegate its powers.

10. The work it directs must be constructed under the supervision of an official appointed for that purpose by the Committee; and

11. The railway company may, if it choose, construct the works directed, under such supervision, instead of permitting the municipality to do so.

The proper form of judgment can, perhaps, be agreed upon by the parties, complying with the views I have expressed, and sufficient for the requirements of the case. But, if not, further evidence, by way of affidavit or otherwise, may be given, upon any disputed question of fact, and the parties will be heard again in Court, upon any points upon which they cannot agree, on the 4th day of September, next, at 10 a.m., at Osgoode Hall.

Proceedings upon the judgment will be stayed for thirty days. It is not a case of urgency. Any injury the plaintiffs may sustain in the meantime can be fully compensated in damages. For this reason no interlocutory injunction would have been made by me.

In any view of the case the plaintiffs had a substantial claim, which the defendants would not have acceded to without action, and therefore they must pay the plaintiffs' general costs of the action.

Judgment.

Meredith, J.

E. B. B.

### BOGART V. TOWNSHIP OF KING ET AL.

*Assessment and Taxes—Special Rate—Bonus By-law—Duty of Clerk—Collector's Roll—Debentures, Sale of—Failure of Scheme.*

Where a by-law of a township corporation provided for the raising by the issue and sale of debentures of a certain sum to be paid by way of bonus to a railway company, and for the levying of an annual rate for the purpose of paying the debentures :—

*Held*, that it was the duty of the township clerk under sec. 129 of the Assessment Act, without any further direction or authorization, to insert in the collectors' rolls the amount with which each ratepayer was chargeable under such by-law ; and it was not necessary that the amount levied each year under such by-law should be mentioned in the annual by-law authorizing the levy of sums for ordinary expenditure ; and sec. 402 of the Municipal Act had not the effect of making it necessary.

*Clarke v. Town of Palmerston* (1883), 6 O.R. 616, distinguished.

2. That the rate could be levied notwithstanding that none of the debentures had been sold.
3. That the failure to collect the rate for the first year after the passing of the by-law did not cause the failure of the whole scheme.

*Seem*, that if the scheme should fail and nothing be paid to the railway company, the ratepayers could recover their money from the corporation.

THE statement of claim alleged : (1) that the plaintiff was a farmer residing in the township of King, and the defendants were the municipal corporation of the township and one Edwards, the tax collector for the township ; (2) that the plaintiff was rated on the last revised assessment roll of the township, and was the tenant of lot 10 in the first concession, and the person liable to pay the taxes thereon ; (3) that the defendant municipal corporation did on the 25th September, 1897, pass by-law No. 66 to raise by way of loan \$12,000 for the purpose of giving a bonus to the Schomberg and Aurora Railway Company to

Statement.

**Statement.**

assist them in building a railway through part of the township; (5) that the debentures referred to in by-law No. 66 had not been sold nor issued, nor had any work been done by virtue of which the railway company were entitled to call upon the defendant municipal corporation for any payment under the by-law; (6) that no rate was levied or collected under the by-law or in respect thereof for or during the year 1898; (7) that on the 26th August, 1899, the defendant municipal corporation purported to pass by-law No. 89, authorizing the levy of certain sums for county, township, and general school purposes for the current year; (8) that on or about the 18th November, 1899, the defendant Edwards demanded of the plaintiff payment of the sum of \$23.20, of which sum \$3 was in respect of by-law No. 66; (9) that the plaintiff tendered to the defendant Edwards \$20.20 and refused to pay the \$3, but the defendant Edwards refused to accept the sum tendered; (10) that before commencing this action the plaintiff gave the defendant Edwards a notice in writing to the effect that he refused to pay the "bonus railway tax" demanded, and in case the demand was persisted in would apply for an injunction and costs, etc.

The plaintiff claimed: (1) a declaration that the defendants were not entitled to collect the \$3; (2) an injunction restraining the defendants from proceeding to collect it; (3) costs; (4) general relief.

The statement of defence (1) admitted the allegations contained in paragraphs 1, 2, 3, 7, 8, and 10 of the statement of claim; (2) denied all the other allegations; (3) alleged that by-law No. 66 was duly registered on the 6th October, 1897, and no proceedings had been taken to quash it; (4) that, subsequent to the passing of by-law No. 89, the defendant municipal corporation, on the 15th December, 1899, passed a by-law for the better securing and authorizing the collection of taxes imposed under by-law No. 66, enacting that the "action of the clerk of the township in placing the said rate (commonly known as

'the railway bonus tax or rate') upon the collector's roll for the year 1899 be and the same is hereby ratified and confirmed," etc.; (5) that the sum of \$3 in respect of by-law No. 66 had, without protest, been duly paid by the plaintiff to the defendant Edwards; (6) that the defendant Edwards had been improperly made a party defendant; (7) that no cause of action was disclosed by the statement of claim.

Statement.

The plaintiff replied that the \$3 was paid by him under protest and only to prevent the defendant Edwards from taking steps to collect the same.

The action was tried before MEREDITH, J., at the Toronto non-jury sittings, on the 5th April, 1900.

*S. H. Blake, Q.C., and T. H. Lloyd, for the plaintiff.*

*Shepley, Q.C., and A. B. Armstrong, for the defendants,*

August 29, 1900. MEREDITH, J.:—

The clerk was, in my opinion, bound by sec. 129\* of the Assessment Act to include the rate in question in the collector's roll.

The by-law in question required it to be levied; the Municipal Act required that the by-law should so provide: see secs. 696 (3) and (6), 386 (2), and 384 (5).

\* 129. The clerk of every local municipality shall make a collector's roll or rolls as may be necessary, containing columns for all information, required by this Act to be entered by the collector herein; and in such roll or rolls he shall set down the name in full of every person assessed, and the assessed value of his real and personal property and taxable income, as ascertained after the final revision of the assessment roll, and he shall calculate, and, opposite the assessed value, he shall set down in one column to be headed "County Rates," the amount for which the person is chargeable for any sums ordered to be levied by the council of the county for county purposes, and in another column to be headed "Township Rate," "Village Rate," or "City Rate," as the case may be, the amount with which the person is chargeable in respect of sums ordered to be levied by the council of the local municipality for the purposes thereof, or for the commutation of statute labour, and in other columns any special rate for collecting the interest upon debentures issued, or any local rate or school rate or other special rate, the proceeds of which are required by law, or by the by-law imposing it, to be kept distinct and accounted for separately; and every such last mentioned rate shall be calculated separately, and the column therefor shall be headed "Special Rate," "Local Rate," "Public School Rate," "Separate School Rate," or "Special Rate for School Debts," as the case may be.



Judgment.

Meredith, J.

The clerk's duty under sec. 129 of the Assessment Act is to make collectors' rolls, and, among other things, to calculate and insert in the rolls the amount which each ratepayer is chargeable with in respect of sums ordered to be levied by the council, inserting in a separate column such rates as that in question and certain other rates.

What more, then, is needed?

The council had, by the by-law in question, ordered the sum, of which the rate in question is a part, to be levied; and the clerk had, as required by the Act, rightly calculated the amount chargeable against the plaintiff, and set it down in the roll.

The plaintiff's contention is that the 402nd section of the Municipal Act† required something more to be done before the rate could be lawfully inserted in the roll; that it requires that the council shall again act in some way before the clerk's duty could arise.

I am quite unable to agree in that contention.

Why should the council be required twice to order the same thing to be done? The Assessment Act gives no countenance to the contention. The by-law in question had ordered the levy, and being so ordered, the 129th section commands the clerk to calculate, and set down in the roll, the rate.

† 402.—(1) The council of every municipal corporation, and of every provisional corporation, shall in each year assess and levy on the whole ratable property within its jurisdiction, a sufficient sum to pay all valid debts of the corporation, whether of principal or interest, falling due within the year; but no such council shall assess and levy in any one year more than an aggregate rate of two cents in the dollar on the actual value, exclusive of school rates and local improvement rates.

(2) If in a municipality the aggregate amount of the rates necessary for payment of the current annual expenses of the municipality, and of the interest and principal of the debts contracted by the municipality on or prior to the 29th day of March, 1873, exceeds the said aggregate rate of two cents in the dollar on the actual value of such ratable property, the council of the municipality shall levy such further rates as may be necessary to discharge obligations incurred up to that date, but shall contract no further debts until the annual rates required to be levied within the municipality are reduced within the aggregate rate aforesaid; but this shall not affect any special provisions to the contrary contained in any special Act now or hereafter in force.

The great care with which the Legislature has provided that all sums necessary for the payment of such debts as that in question shall be levied and paid, is shewn very plainly in the Municipal Act; for examples, see secs. 392, 393, 412, 413, 414, 415, and 429. The prohibition against the use of the money for other purposes, and also against interference by the council with the levying of it, is very pointed, sec. 393 providing that "no officer of the municipality shall neglect or refuse to carry into effect a by-law, for paying a debt, under colour of a by-law illegally attempting to repeal such first mentioned by-law, or to alter same so as to diminish the amount to be levied under it." This is but one instance.

Judgment.

Meredith, J.

It would be strange, then, if it required renewed annual action on the part of the council to authorize the levy of such a rate.

But it is vigorously contended that that is the effect of sec. 402.

That section, however, requires only that the council shall in each year *assess and levy* upon all ratable property a sum sufficient to pay all the valid debts of the corporation, but not to exceed in all two cents in the dollar, exclusive of school and local improvement rates.

There is nothing requiring the passing of a second by-law, authorizing again the levying of a rate already authorized, but the council are, as I understand the section, to see that that rate and all others lawfully imposed are duly levied; consonant with, not in contradiction of, the other provisions of the Act to which I have referred.

They are not required by this section to pass a by-law; it is not the legislation which enables them to raise money for the current year's outlay; that is provided for in sec. 405, and, as one might expect, there is no provision that they *shall levy*, but the provision is that they may *pass by-laws for raising* the sum required.

It is not important whether such by-laws ought to include the sums required under such by-laws as that in

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question or not, for that would not relieve the clerk from his duty; but I am inclined to think that they ought not—that the estimates of the requirements for the lawful purposes of the municipality, referred to in secs. 404 to 408, are of debts to be incurred, debts in respect of which no provision for their payment has been made. If that were not so, if the debt provided for by the by-law in question were to be included in the estimates and by-law, then, under sec. 407, in case of a deficiency and no unappropriated fund to make it up, it could be deducted from any sum to be levied under the by-law in question, which would be absurd, having regard to the careful legislation to prevent such things, to which I have already referred.

It has been suggested that, unless included in the annual by-law, the council would not know whether they were exceeding the two cents in the dollar. But how can such a thing be? The by-law does not give the information; it must be acquired before the by-law is passed.

The purposes of sec. 402 are, in my opinion, to limit the power of the council in incurring debts, and to compel the payment of all debts properly incurred each year as they fall due.

This ground of the plaintiff's action, therefore, fails, and, without conflicting with anything that was adjudged in the case of *Clarke v. Town of Palmerston* (1883), 6 O.R. 616. It was not adjudged in that case that the clerk could not, in the absence of a by-law passed under sec. 402, insert the rate in the roll; it was adjudged that the council was bound to have the rate collected.

The second ground of the plaintiff's contention is, that, as the by-law provides for raising the money for the payment of the debentures, it cannot be levied because the debentures have not yet been sold, and so there is, strictly speaking, no debenture debt yet existing.

The words of the by-law, in its enacting part, are: "for the purpose of paying off the said debentures there shall be raised, levied, and collected" (par. 5); and, in the

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preamble, "to provide for the payment of the annual instalments of principal and interest on the said debentures, as the same shall fall due and be payable, it is necessary to raise a certain specific sum annually for the due payment of such instalments."

But there is, in my opinion, nothing in those words, or elsewhere in the by-law, limiting the taxation under it to the purpose of payment of a debenture already sold; the purpose of the taxation is just as much "the payment off of the debentures," whether they were sold the day before action brought, or a day, a week, a year, or any other time after, provided, of course, that the "negotiation" of them at the later period is within the power of the council; and in this case no claim that it is not has been made, and the circumstances of the case seem to quite warrant, if not require, such delay.

And the last ground of claim is, that the failure to collect the rate for the first year has caused a failure of the whole scheme. Why that alone should have that effect, I am unable to perceive.

The corporation have entered into a contract with the railway company to pay them the money to be raised under the by-law, upon the fulfilment of certain conditions. The time for payment has not yet come.

The neglect of the corporation to see to the collection of money to pay one debenture could hardly relieve them from their contract.

But in this case the explanation is simple, and, substantially, there has been no neglect, though the mode of procedure may not have been all that is requisite under the Act.

Under the contract between the corporation and the railway company, it is not yet certain whether the latter will earn the bonus, whether the conditions of the agreement will be fulfilled. Until that is known it may or may not, as the council may think, be advisable to sell the debentures. In the meantime it has turned out that enough will be

Judgment.  
Meredith, J.

realized by the sale of fourteen out of the fifteen debentures to pay the bonus, and so the council by resolution authorized and directed the clerk to levy no rate in respect of this—the first—debenture.

If ratepayers desire to restrict the power of the council, desire to have more definite agreements made for payment of the bonus, they must abstain from voting for, or vote against, the by-law, until the terms they desire are insured. The contract is the corporation's, not that of the ratepayers.

It may possibly be that the resolution, and the observance of it, were not in accordance with the requirements of the Act: see secs. 391, 392, 412, and 413: but that does not affect the question; the plaintiff has not much to complain of in the fact that he has escaped one rate which he expected to pay.

The scheme in this case has not yet failed, and nothing has been done but what is quite consistent with the payment of the bonus as provided for in the agreement.

It was said that if the scheme should fail, and nothing be paid to the railway company, the ratepayers would be compelled to part with their money without consideration, and could not recover it. But that cannot be, for, if there be no provision on the subject in the Act, the money would surely be recoverable in equity, if not at common law as money payable by the corporation to the ratepayer for money received by the corporation for the use of the ratepayer.

No case was made of any delay prohibited or unauthorized by the statute, and so I have not considered whether or not there is any statutory limitation to the time within which such debentures must be sold.

The three grounds upon which the action is based fail.

The action will, therefore, be dismissed with costs.

E. B. B.

## ROSS V. THE QUEEN.

*Revenue—Succession Duty Act—Deduction of Debts—Compromise of Claim  
[by Executors—R.S.O. c. 24, s. 3, sub-sec. 3.]*

For the purpose of arriving at the aggregate value of the property of a deceased person under sec. 3, sub-sec. 3 of the Succession Duty Act, R.S.O. c. 24, debts are to be deducted. The duty to be paid by the person who takes is on the value of the estate which he takes at the time of taking.

Sums *bond fide* paid by executors for the purpose of settling claims against them as such, must be considered debts for the purpose of administration and of ascertaining the amount of succession duty.

Where executors erroneously and in ignorance of the existence of claims overvalued the estate and paid succession duty for which the estate would not have been liable had the amount of such claims been deducted therefrom they were held entitled to recover back from the Crown the amount of the duty wrongly paid.

THIS was a special case submitting for the opinion of the Court certain questions arising on a petition of right presented to the Government of Ontario by the executors and executrix of the last will of Aaron Ross, deceased, and by the residuary legatees thereunder.

Statement.

The petition after setting out the death of Ross on July 11th, 1896, and that by his will his property passed to his executors for the benefit of his wife and children, proceeded as follows :

3. Your suppliants the said executors and executrix erroneously and through a mistake of fact, believing that the estate of Aaron Ross was liable to pay succession duty under "The Succession Duty Act" and therefore subject to the Act, filed an inventory under and pursuant to section 5 of the Act with the proper Surrogate Registrar.

4. The inventory filed as aforesaid shewed the estate as amounting in value to the sum of \$104,115.31 after the deduction of debts and other deductions allowed by the Act.

5. Your suppliants the said executors and executrix believing the statements in the inventory to be true and correct paid to the Treasurer of this Province in the

Statement. month of December, 1897, the sum of \$2627.88 as and for the succession duty justly payable in respect of the estate under the Act.

6. At the time of the decease of Aaron Ross and for some years prior thereto he had been a director of The Farmers Loan and Savings Company, a company duly incorporated and carrying on the business of loaning money on landed securities in this province.

7. Prior to the month of April, 1898, the said company had become insolvent and subject to the provisions of the Winding-Up Act, and by the judgment and order of the High Court of Justice for this Province dated November 16th, 1897, the company was ordered to be wound up, and a liquidator under the provisions of the Winding-Up Act was duly appointed.

8. The liquidator appointed as aforesaid upon investigation of the affairs of the company ascertained as the fact was and is, that many thousands of dollars had been paid to the shareholders of the company by way of dividends out of the capital thereof, and that the said dividends had been paid pursuant to by-laws passed by the directors of the company of whom Aaron Ross was one.

9. The liquidator of the company in the month of April made a claim against your suppliants the said executors and executrix for payment of the dividends paid out of capital as aforesaid, claiming that such payment was a breach of trust on the part of Aaron Ross as director as aforesaid, and that the amount thus paid constituted a debt for which the estate of Aaron Ross in the hands of your suppliants as executors and executrix was liable. Thereafter proceedings in this Court were commenced by the liquidator against your suppliants the said executors and executrix for payment of the amount of such dividends.

10. Your suppliants the said executors and executrix after careful investigation, and advice of counsel learned in the law, and with the consent of their co-suppliants effected a settlement with the liquidator, whereby the said

claim was compromised on the terms following:—your suppliants to pay to the liquidator the sum of \$5,000 and each party to pay his own costs of the proceedings. Your suppliants thereupon paid to the liquidator the sum of \$5000 and the costs amounting to over \$600.

11. Your suppliants at the time when the inventory was filed and at the time when the duty was paid as aforesaid, had no knowledge or notice of the insolvency of the company or of the payment of any dividends out of the capital of the company, or of the existence of any claim against Aaron Ross or his estate in respect of the matters aforesaid or any of them.

12. In the inventory filed as aforesaid and among the assets of the estate appears twenty-nine shares of the company upon which only twenty per cent. had been paid up.

13. As the fact was and is at the time of the death of the deceased and at the time of the filing of the inventory and at the time of the payment of the duty the company was wholly insolvent, and was unable to pay its creditors even after payment in full of all its stock, and the liability in respect of stock was then an actual and existing indebtedness of the estate which had to be paid and satisfied. Your suppliants at the time aforesaid were not aware of any of the facts and circumstances in this paragraph mentioned.

14. Your suppliants the said executors and executrix upon the demand of the liquidator paid to him out of the assets of the estate the sum of \$1160 being the amount of the liability of the estate in respect of stock.

The petition then set out that the suppliants had erroneously and through want of knowledge over valued the estate by the sum of \$9,944, and made their payment to the Treasurer of the Province as above stated, and prayed a refund.

The questions herein agreed to be submitted to the Court were: 1. Are debts to be deducted for the purpose



**Statement.** of arriving at the aggregate value of the property of a deceased person under R.S.O. c. 24, sec. 3, sub-sec. 3. 2. Are the sums of \$5000, \$600, and \$1160 in the petition mentioned, debts within the meaning of that Act, and are any of the said sums, debts within such meaning?

The case was argued on June 12th, 1900, before ROSE, J.

*J. H. Macdonald*, Q.C., and *Ebbels* for the petitioners contended that it was always the net estate which was the subject of duty under Succession Duty Acts, whereas in the case of probate duty the tax is on the whole estate: *Blackwood v. The Queen* (1882), 8 App. Cas. at p. 90; the duty here is on the succession: *Hanson on Death Duties*, 4th ed., p. 53; the Act fixes \$100,000 as the limit to which lineal descendants would be allowed to receive benefits without paying duty.

*Cartwright*, Q.C., for the Crown, referred to the express exclusion of debts in sub-sec. 1 of sec. 3, as contrasted with the absence of similar words in sec. 4; and to sec. 17 as making the matter still more clear. He also referred to *Wentworth v. Whittemore* (1805), 1 Mass. 470; 8 Am. and Eng. Encyl. of Law, 2nd ed., p. 986; *Anderson's Law Dict. sub voc.* "debts."

*Macdonald* in reply referred as to question 2 to *Sharp v. Jackson*, [1899] A.C. 419, 426, and urged that an executor was not bound to dispute every claim against an estate before he could get it deducted in fixing succession duty. He also cited *Wishart v. Lord Advocate* (1880), 8 Ct. Sess. Cas. 4th ser., p. 74.

ROSE, J.:—

I think I will dispose of the questions now, because I have an opinion which I think would not be changed by further consideration, and, as I said in *Attorney*

*General v. Cameron*, any decision must be to some extent an arbitrary one.

Judgment.

Rose, J.

The first proposition to which I have bound myself by my opinion in *Attorney General v. Cameron* (1896), 27 O.R. 380, and 28 O.R. 571, is that the person who takes is the person to pay; and the second, that the duty to be paid by the person who takes is on the value of the estate which he takes at the time of taking. I would add the following: third, as appears from sec. 4, sub-secs. 3 and 4, the amount of duty is computed upon the value of the estate going to the taker; fourth, that by sec. 17 it is, I think, made manifestly clear that it is not the intention that the estate that is appropriated to the payment of debts shall pay any duty; fifth, this leaves, as a consequence, that the estate on which the duty is to be paid is the surplus estate after payment of debts.

This is consistent with sub-sec. 1 of sec. 3, which declares the value of the estate, for the purposes of that sub-section, to be the value of the surplus after the payment of debts and expenses of administration. This language is not repeated in sub-sec. 3 of sec. 3, but if the omission from such sub-section of the reference to debts is to saddle the estate with the payment of succession duty upon such debts (with the contradiction involved in the use of the terms "succession duty" and "debts") then it would follow that the expenses of administration are not to be deducted in order to ascertain the amount of the estate, but in some way or other, not pointed out by the Act, succession duty would have to be paid upon so much of the estate as is set apart for such expenses. It was not argued, and I think it would be impossible to argue with any shew of reason that it was ever intended that the amount of the estate which is to be used in payment of funeral and testamentary expenses should bear succession duty.

If the principles which I have enunciated as being the principles to be found in the Act are the correct ones,

Judgment.

Rose, J.

then it is only the estate which goes in line of succession, either through an executor or administrator or otherwise, that is to pay succession duty.

I think the conclusion to be drawn from that is that the language of sub-sec. 3 of sec. 3 is to be so read that the property passing under a will to the persons named is to pay succession duty, and not the property that passes to the executor or administrator for the purposes of paying funeral and testamentary expenses and debts.

Question 1 will be answered in the affirmative.

As to question 2, I think that the sum of \$5,000 paid by the executors for the purpose of settling the claim made against them with reference to the moneys improperly paid out of capital, or apparently improperly paid out of capital, must be considered a debt for the purpose of administration and for the purpose of ascertaining the amount of succession duty, and for this reason: the executors are the persons on whom the statute casts the duty of administering the estate and determining what claims are just and proper to be paid. In the absence of fraud or misconduct amounting to fraud, the executors are the persons who must determine what claims are to be admitted or rejected. I must take it that in effect it is stated in this case that in the exercise of that discretion, and acting upon the advice of counsel learned in the law, the executors thought it to be their duty to admit this claim. I think it is reasonably clear that if directors allowed, permitted, or directed dividends to be paid out of capital and no explanation appeared of such an act, they would be personally liable for malfeasance, and therefore the case shews a liability or debt.

As to the \$600 costs, I have some little doubt, but the inclination of my mind is to allow it, for this reason: The amount paid in settlement of the claim was \$5,600. Although a portion was applied in payment of costs, it must be a reasonable inference from the facts stated that but for the payment of that sum there would have been

no settlement; therefore the executors were justified in paying \$5,600. Whether the sum of \$600 was applied in payment of costs or not, I think, cannot affect the principle.

Judgment.

Rose, J.

Then with reference to the other claim, the sum of \$1,160, I think the case states that that was an existing indebtedness which the executors were bound to pay; but even had not the case so stated, it seems to me that the reasons I have given for the allowance of the \$5,600 must lead my mind to the same conclusion with reference to the \$1,160, and that it must be held to have been a debt properly paid by the executors. Any other determination would lead to inconvenience and would enable the Treasury Department practically to enter upon a revision of the administration of the estate and to contest the powers and rights of the executors upon the allowance of every claim, and place the administration of the estate practically in the Treasury Department, instead of in the executors.

How far the Treasury Department could come into Court and claim administration or supervision by means of the Court over executors and a disallowance of claims which an executor or administrator had allowed is a question that it is unnecessary to consider.

I think that question 2 must also be answered in the affirmative.

With reference to what is a debt arising from a breach of trust, see *Sharp v. Jackson*, [1899] A.C. at p. 426.

A. H. F. L.

## IN RE CURRY, CURRY V. CURRY.

*Evidence—Corroboration—Other Facts Adduced—Party Obtaining Decision—R.S.O. c. 73, s. 10.*

In an action by or against the representatives of a deceased person, the corroborative evidence required by R.S.O. c. 73, s. 10, may be found in the other facts adduced in the case, raising a natural and reasonable inference in support of the evidence, whereof corroboration is required. *Semble*, corroborative evidence within the meaning of that enactment may be given by an interested party so long as he is not the party obtaining the decision.

This was an appeal from the Master at Windsor in reference to the rate of interest allowed by him on a claim under the circumstances set out in the judgment, and was argued on June 12th, 1900, before STREET, J.

**Statement.**

*Fleming* and *J. H. Moss* for Annie H. Curry and the executor of Cora J. Curry.

*Wallace Nesbitt*, Q.C., and *H. T. W. Ellis* for the administrator of Mrs. Glen's estate.

*S. H. Blake*, Q.C., and *Sutherland*, Q.C., for John Curry, the executor of Jas. R. Curry.

The following authorities were referred to: *Stoddart v. Stoddart* (1876), 39 U.C.R. 203; *Taylor v. Regis* (1895), 26 O.R. 483; *Re Ross* (1881), 29 Gr. 385; *Radford v. Macdonald* (1891), 18 A.R. 167; *Green v. McLeod* (1896), 23 A.R. 677.

June 14th, 1900. STREET, J.:—

The administrator of the estate of the late Mrs. Glen has claimed against the estate of the late Jas. R. Curry the sum of \$6522.50, with interest for many years, and the Master at Windsor has allowed the claim with interest at rates varying from 10 to 6 per cent. for different periods, basing his allowance of the rate of interest upon a contract which he has found to have been made between Mrs. Glen and Jas. R. Curry in their lives to the effect

that he should pay to her the same rate as she paid from time to time upon certain money borrowed by her from third persons. The claim now in question was made in the Master's office in these administration proceedings in which John Curry, as the surviving executor of Jas. R. Curry, is plaintiff, and Annie Harris Curry, the widow of Jas. R. Curry, Oscar E. Fleming, executor of the estate of Cora J. Curry, deceased (who was Jas. R. Curry's only child), and William George Curry, a brother of Jas. R. Curry, are the defendants.

Judgment.

Street, J.

The evidence given before the Master in support of the special contract with regard to the rates of interest to be paid was that of John Curry and W. G. Curry, both of whom swore positively that at the time the loan was made it was agreed that, inasmuch as Mrs. Glen, the lender, who was the mother of Jas. R. Curry, John Curry, and Wm. G. Curry, was at the time of the loan herself under contract to pay a higher rate of interest upon certain moneys which she had borrowed from a third party, and out of which in fact the greater part if not the whole of the moneys lent by her to Jas. R. Curry came, Jas. R. Curry should pay her upon the moneys he borrowed from her the same rate of interest from time to time as she should be required herself to pay. Documentary evidence was produced shewing that Mrs. Glen was paying a higher rate of interest than six per cent. at the time part of her advance was made to Jas. R. Curry and that she continued for several years to pay varying rates exceeding six per cent. upon the moneys she owed, during all of which period the debt due her by Jas. R. Curry continued unpaid. The Master having found in favour of the contract to pay these higher rates of interest, the defendants, Annie H. Curry and Oscar E. Fleming, executor of Cora J. Curry, appealed upon the ground that John Curry and Wm. G. Curry were interested parties and that their evidence was not corroborated within sec. 10 of the Evidence Act, R.S.O. c. 73. Their interest arises in this way: their mother, Mrs.

Judgment.  
Street, J.

Glen, having died intestate, her estate became divisible into three equal parts, of which John Curry and Wm. G. Curry each take one and the appellants take the other part: under the will of Jas. R. Curry, John Curry and Wm. G. Curry each take one-eighth and the appellants take the other three-fourths. So that John Curry and Wm. G. Curry are more largely interested in the estate of Mrs. Glen than in that of Jas. R. Curry.

Our law of evidence does not exclude the evidence of interested persons generally; the contrary is expressly declared by secs. 2 and 3 of the Act, R.S.O. cap. 73.\* It is only in the cases coming within the 6th, 10th and 11th sections that corroboration is required as a matter of law. In other cases the weight to be given to the evidence of persons who being interested have given their testimony is a matter which is left to the tribunal before which it is given. In my opinion the facts of the present case do not bring it within the 10th section. The claimant is Anderson, the administrator of Mrs. Glen's estate: he makes his claim against John Curry, the executor of Jas. R. Curry's estate. Those are the two parties: the evidence of the defendants, John Curry and Wm. G. Curry is adduced in support of the claim of the claimant Anderson. If the decision is in favour of the claimant, it will be the case of an "opposite party" obtaining a decision therein against the estate of the deceased Jas. R. Curry upon the evidence of another party to the action who is interested, but who does not obtain the decision: the party who is "interested" is not the party who obtains the decision.

I think, however, that the other facts adduced are corroboration within the meaning of the Act as interpreted by the decisions: *Stoddart v. Stoddart*, 39 U.C.R.

\* R.S.O. c. 73, s. 10. In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to an action shall not obtain a verdict, judgment, or decision therein, on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

203; *Radford v. Macdonald*, 18 A.R. 167; *Green v. McLeod*, 23 A.R. 677.

Judgment.

Street, J.

The object of Mrs. Glen in raising the money which she lent to Jas. R. Curry, her son, was evidently to help him in his business. It was shewn that she borrowed it at rates higher than the legal rate of six per cent. It would be natural and reasonable that she should stipulate under such circumstances that she should be saved from loss by receiving from her son the same rate that she was paying: it would be unnatural and unreasonable that she should receive only six per cent. while paying seven, eight and ten per cent. under the circumstances. I hold, therefore, that if corroboration were required of the evidence upon which the Master has found in favour of the special contract with regard to interest, it was forthcoming in other circumstances to which I have referred.

The appeal by these appellants upon all the grounds upon which it is based has been dismissed and the appellants must pay the costs of the appeal.

A. H. F. L.



THE MUNICIPAL CORPORATION OF THE TOWN OF PETERBOROUGH V. THE GRAND TRUNK R.W. CO.

*Railways—Diverting Stream Under Highway—Erection of Substitutional Bridge—Liability to Keep in Repair.*

A railway company, desiring to cross a highway at a point where it was carried by a bridge over a small stream, in pursuance of its statutory powers, diverted the stream to a point some distance away, and built a new bridge over it where it there intersected there highway :—

*Held* that, whatever remedy the municipality might have if it had sustained damage by reason of the exercise by the railway company of its rights, the latter was under no liability, in the absence of special agreement, to keep the bridge substituted by it in repair.

**Statement.**

THIS was an action brought for a mandamus to compel the defendants to repair and keep in repair a certain bridge, under the circumstances set out in the judgment of STREET, J., before whom the action was tried on May 28th, 1900.

*Edwards, Q.C.*, for the plaintiffs.

*Wallace Nesbitt, Q.C.*, for the defendants.

June 11th, 1900. STREET, J.:—

Action tried before me at Peterborough on May 28th, 1900, without a jury.

In 1882 the Midland Railway Company built their line of railway across Smith Street, a public highway now within the limits of the Town of Peterborough. At the point where their line crossed the highway, the highway was carried by a bridge over a small stream. The railway company, in the exercise of their statutory powers, diverted the stream so as to make it cross the highway about 150 feet to the east of the line of railway, filling up the original bed save for the space occupied by a small culvert, partly under their line, for carrying away surface water, and building a new bridge over the highway where the stream, as diverted, crossed it. The defendants have been substituted by Act of Parliament for the Midland Railway Company, so far as the liabilities of the latter are concerned,

and are now answerable for everything for which the latter could have been made liable. The plaintiffs allege that the bridge is out of repair and that the defendants are liable to rebuild it or to keep it in repair, and they ask for a declaration to that effect and for a mandamus to compel them to rebuild it and to make good and restore the highway to its former state.

Judgment.

Street, J.

The plaintiffs allege that the state of the highway was altered by the diversion of the stream and the change in the position of the bridge made in 1882 upon an agreement between the officers of the Midland Railway Company and the Council of the municipality in which the highway was then included, but no evidence of any such agreement was given. The only evidence offered was to the effect that the new bridge built in 1882 by the Railway Company over the diverted stream was not as substantial a structure as that over the stream in its original bed, that the substituted bridge has been for some years in bad repair, and that the defendants' local officers have at times spent small sums in repairing it. On the other hand, it was shewn that for sixteen or seventeen years after the erection of the substituted bridge it had been travelled and used by the public, and had apparently been accepted as a sufficient bridge by the municipalities having charge of the highway of which it formed part. In the absence of any proof of an agreement between the municipality and the railway company, the plaintiffs' only possible claim is based upon the duties cast upon the latter under the Railway Act. The plaintiffs have given evidence that the bridge erected is not so substantial as the one for which it was substituted, and that the span is some ten feet longer. The railway company seem to have acted within their rights in diverting the stream, and if the municipality has sustained damage by reason of the exercise of those rights, they must proceed under the Railway Act to obtain compensation. They have not asked the defendants to proceed under the Railway Act to have the compensation, if any, ascertained.

Judgment.

Street, J.

Should the defendants refuse to proceed, the plaintiffs will have their remedy by mandamus upon motion. Under the circumstances, I do not think I can adopt the suggestion of counsel that I should grant a mandamus in the present action; a motion being the proper course: *Reg. v. Vestry of St. George* (1892), 67 L.T.N.S. 412; *Smith v. Chesley District Council*, [1897] 1 Q.B. 532;\* *City of Kingston v. Kingston, Portsmouth, and Cataraqui Electric R. W. Co.* (1897), 28 O.R. 399.†

The case referred to by Mr. Edwards of *VanAllen v. The Grand Trunk R. W. Co.* (1869), 29 U.C.R. 436, is no authority for the proposition contended for in the present case, that a railway company, without any agreement to that effect, may be declared liable to keep in repair in perpetuity a bridge crossing a highway at a distance from their line of railway.

With regard to the culvert, there was no evidence given of any want of repair; it is under the defendants' line of railway, and has always been kept in repair by them, and their liability to keep it in repair has not been disputed.

I think the action cannot be maintained, and that it must be dismissed with costs.

A. H. F. L.

\* Affirmed [1897] 1 Q.B. 678. Rep.

† Affirmed 25 A.R. 462. Rep.

## IN RE SEBERT V. HODGSON.

*Division Courts—Claim beyond Jurisdiction—Amendment at Trial—  
Waiver—Prohibition—R.S.O., c. 60.*

A Division Court Judge has power to allow a plaintiff to amend his particulars at the trial so as to bring within the jurisdiction a case which, from the nature of the cause of action, was, as originally launched, outside it, and where in such a case the defendant did not insist on re-service of the summons, but answered the claim, and the trial proceeded and the judge found facts shewing jurisdiction, upon which judgment was entered, prohibition was refused.

THIS was a motion by the defendant for a prohibition to the third Division Court of the county of Ontario made under the circumstances stated in the judgment, and was heard on June 11th, 1900, before ROSE, J.

Statement.

*R. McKay*, for the defendant.

*W. E. Middleton*, for the plaintiff.

June 13th, 1900. ROSE, J :—

The summons was issued in the third Division Court of the county of Ontario, endorsed as follows: "To amount of a wager won by the plaintiff, \$20." The defendant disputed the jurisdiction by notice stating "that this court has no jurisdiction to entertain and try this claim." The statute provides that the Division Courts shall not have jurisdiction in actions for any gambling debt.

When the case came on for trial, the defendant objected to the jurisdiction of the court and to the action being entertained. The plaintiff then applied to amend the particulars claiming the recovery of \$10 from the defendant as for money paid to the defendant for the plaintiff's use. As far as the proceedings shew, the defendant did not object, and evidence was offered for the plaintiff in support of his claim as amended. The defendant gave evidence in answer, and judgment was given for the plaintiff, as follows: "I find there was

Judgment.  
Rose, J.

no wager or bet, and I give judgment for the plaintiff for \$10."

The defendant then applied for a new trial, which was refused.

On the motion for prohibition Mr. McKay admitted that if the judge had power to amend, the application must fail. His contention was that the summons being endorsed for a claim over which the court had no jurisdiction there was no power to amend, quoting Mr. Justice Maule's observations in *Taylor v. Addyman* (1853), 13 C.B. at p. 316, where he said: "If he has no jurisdiction he can neither amend nor adjourn nor do anything else, it is *coram non judice*."

There was of course jurisdiction to issue a summons. The statute provides for particulars of the demand and for service of a copy of such particulars upon the defendant, and precludes the plaintiff from giving evidence of any cause of action except such as is contained in the demand.

I have come to the conclusion, having regard to the decisions respecting amendment of particulars and amendment of claim in the Division Court and restricting the granting of prohibition to the amount in excess of the jurisdiction, that the judge had power to allow the plaintiff to amend his particulars and to substitute for a claim beyond the jurisdiction a claim within the jurisdiction. I think that this might be done in Chambers before the service of the summons, and I do not see why it might not be done at any time before judgment.

If the defendant had insisted upon it, I suppose the plaintiff would have been required to serve the summons over again and to give him (the defendant) an opportunity to answer as he might have done had the summons been originally endorsed with the claim in the amended form. But where, as appears here, the defendant does not object to the amendment but proceeds to answer the claim, and the trial proceeds and the judge finds the facts so as to

shew jurisdiction, and the judgment as entered is within the jurisdiction of the court, I do not think that prohibition should be granted.

Judgment.

Rose, J.

Of course I do not pass upon the evidence to say whether the finding was right. Looking at the facts as shewn upon the material before me, the justice of the case is clearly with the plaintiff, and the defendant is most unconscionably seeking to retain money to which he has no right.

The motion must be dismissed with costs.

A. H. F. L.

### SALE V. LAKE ERIE AND DETROIT R. W. CO.

*Words*—"In a Summary Way"—*Reference of Matters in Dispute in an Action—Right of Appeal.*

An action on a solicitor's bill was stayed upon agreement providing for evidence to be given to an accountant named, and "in case of dispute, the matters disputed are to be referred in a summary way to — under R.S.O. c. 174 for decision":—

*Held*, that by "a summary way" the parties meant that the reference was to be without ceremony or delay, the words "under R.S.O. c. 174" merely introducing the procedure under that Act (the Act respecting Solicitors), and not to be construed as providing for an appeal.

THESE were two motions, one by the plaintiff for judgment on the report of Mr. Marcon, the Deputy Clerk of the Crown at Windsor, made under the circumstances stated below, and the other by the defendants by way of appeal therefrom.

Statement.

The plaintiff being assignee of the claim against the defendants under certain solicitor's bills of costs, sued for the amount of some of the bills. After issue joined, the agreement of November 13th, 1899, referred to in the judgment, was entered into staying the proceedings, and

Statement.

providing that the solicitor's bills (those in suit as well as others) were to be paid, subject to a general reduction of \$300, upon evidence being given to Mr. Lye, an accountant, as to services rendered and disbursements made. The fourth clause of the agreement was as stated in the judgment; and a number of items in the accounts being disputed by the defendants were accordingly referred to Mr. Marcon, who made a finding or report on November 13th, 1899, disposing of the matters specially referred to him, and also of several other matters which were apparently gone into by consent before him.

Both motions were argued together on June 14th, 1900, before ROSE, J.

*F. A. Anglin*, for the plaintiff.

*W. H. Blake*, for the defendants.

June 15th, 1900. ROSE, J.:—

I think neither motion can prevail.

As I read the agreement of November 13th, 1899, proceedings in this action were stayed. Consequently upon the stay, the company and Messrs. Walker & Son \* agreed with the plaintiff to pay the balance due in respect of the bills or accounts referred to, less a deduction of \$300.

Apart from the subsequent clauses, this agreement was outside of the suit, and the plaintiff must enforce it in such a manner as he may be advised. The agreement extended to matters not in issue between the parties, and Messrs. Walker & Son were not parties to the action.

Clause 3 of the agreement provided that evidence as to services rendered and disbursements made was to be given to Mr. Lye, an accountant, it was stated, the clause providing that these were "to form the amounts payable after such

\* Walker & Son executed this agreement partly as principal shareholders in the defendants' company, and partly as interested in certain other matters which were also referred to Mr. Marcon.—Rep.

deduction has been made, but including interest legally chargeable from February 22nd, 1899."

Judgment.

Rose, J.

The fourth clause was as follows: "In case of dispute as to services rendered or disbursements made, the matters disputed are to be referred in a summary way to F. E. Marcon, Deputy Clerk at Windsor, under R.S.O. 174 for decision." This agreement was signed by the plaintiff Sale and by Walker & Son.

The agreement seems to me to be a very simple one to understand. Certain bills of costs had been produced, and the Railway Co., and Messrs. Walker & Son, subject to its being shewn that the services had been rendered and the disbursements made, agreed to pay the amount claimed less \$300 by way of deduction. It does not appear on what principle the sum of \$300 was deducted.

The promissors evidently were content, if Mr. Lye was satisfied from evidence tendered to him that the services had been rendered and disbursements made, that his decision should govern, and that they would abide by it, but if the solicitors and he could not agree, then as to any matter disputed it was to be referred in a summary way to Mr. Marcon to determine as to such matters disputed whether the services had been rendered or the disbursements made.

By a "summary way" I take it that the parties meant that the reference was to be "without ceremony or delay." See Standard Dictionary, *sub nom.* "summary." The addition of the words "under R.S.O. 174" seems to me merely to introduce the procedure under that Act as far as applicable.

This was not a reference of a bill for taxation; it was merely a reference of certain disputed matters, and the reference was limited to the ascertainment simply of whether the services were rendered or the disbursements made. There was no power given to Mr. Marcon to determine whether any charge for services was too small or too large, or whether the disbursements were reasonable or unreasonable.



Judgment.

Rose, J.

I do not think that this reference provided for an appeal, and it seems to me it is clear that the parties intended to be bound either by what Mr. Lye agreed to or what Mr. Marcon determined, and the certificate of Mr. Marcon given to the parties as to his findings upon the disputed items within the scope of the reference, as I have stated it, must, I think, determine the questions between them.

It appears that many things were discussed before Mr. Marcon that were entirely outside of the scope of the reference, and the report or certificate contains findings upon such matters. These, I think, are not in any sense binding upon the parties.

As I have said, I do not think that this is a proceeding in the action, and it is not a case in which I can make any order. Both motions must be dismissed with costs.

A. H. F. L.

## MACDONALD V. MAIL PRINTING CO.

*Defamation—Trial—Nonsuit after Verdict—Innuendoes—Onus—Evidence for Jury—Newspaper—Report of Speech—"Blackmailing," Meaning of—Truth of Defamatory Words.*

Where, in the course of the trial of an action before a Judge and jury, a motion for a nonsuit is made at the close of the plaintiff's case, and again at the close of the whole evidence, and the Judge adopts the course of taking a verdict, and of fully hearing and considering the motion, if necessary, after the verdict, the Judge may, in a proper case, nonsuit the plaintiff, notwithstanding a verdict of the jury in his favour.

- *Perkins v. Dangerfield* (1879), 51 L.T.N.S. 535, and *Connecticut Mutual Life Ins. Co. of Hartford v. Moore* (1881), 6 App. Cas. 644, distinguished.

*Floer v. Michigan Central R. W. Co.* (1900), 27 A.R. 122, 127, specially referred to.

In an action for libel the words complained of were: "It can be readily understood what interest Mr. M. has in the matter, and why he should make advances, hire committee rooms, and generally control the campaign, when \$4,000,000, which he controls, will be made available if (the plaintiff) can be elected mayor. In addition to this, Mr. M. has between \$7,000 and \$10,000 of claims against (the plaintiff), which in proceedings it was shewn under oath of Mr. M. that he hoped to be paid, should he succeed in qualifying (the plaintiff) for mayor, and then electing him."

The innuendo was, that the defendants charged the plaintiff with having "entered into a corrupt arrangement" with one M., "whereby the plaintiff should use the office of mayor, when elected, for private gain," and with having "unlawfully and corruptly influenced or attempted to influence the said M. to support him in the mayoralty campaign, both financially and otherwise," and with being "unlawfully and corruptly influenced" by said M. "to use the said office of mayor to improperly advance the pecuniary and private undertakings of said M.:"—

*Held*, that, there being no evidence, apart from the newspaper article in which they appeared, to shew that the words bore any other than their ordinary meaning, the onus of proof of the innuendo was not satisfied; there was no reasonable evidence to go to the jury that the words conveyed the meaning which the plaintiff attributed to them.

The plaintiff also complained of a statement published by the defendants, that a speaker at a public meeting "characterized" the plaintiff's behaviour as "blackmailing." The defendants pleaded the truth of the words used:—

*Held*, that it made no difference that the defendants were only reporting, or purporting to report, the words of another, or whether the report was accurate or inaccurate—that question arises on a defence of fair and accurate report only. If the words were true, the plaintiff could not recover.

The word "blackmailing" should not, at the present day and in this country, be limited in its meaning to the case of the crime of extortion by threats, or any other crime.

Where a man, having no right, nor any pretence of right, to receive one farthing (except his proper law costs, if he succeed in the action), receives \$4,500 to hush a complaint of, and to stifle his legal proceed-

ings to prevent, a wrong which he charges is about to be perpetrated by means of audacious bribery of public officers, his conduct may be "characterized as blackmailing" in the proper and ordinary meaning of these words.

There being no evidence of the falsity of the words used, but they appearing, upon uncontroverted evidence, to be true, the plaintiff's case failed.

*Semble*, also, that the innuendoes that the plaintiff "had committed a crime punishable by law," that he was "unworthy of any position of trust," and that he "was a blackmailer," could not be supported.

*Quære*, whether the plaintiff, having chosen to put his own interpretation upon the words, and to bring the defendants down to trial upon that interpretation, and to try the case out accordingly, could be permitted subsequently to reject the innuendoes, and rely upon the words (if untrue) having another libellous meaning, whether libellous in themselves or not.

The respective functions of Judge and jury are in an action of libel in no way different from such functions in other actions, except for the statutory provision in favour of a defendant, R.S.O. 1897 ch. 68, sec. 2. It is the duty of the Court to consider whether there is any reasonable evidence to go to the jury, and, if not, to dismiss the action.

**Statement.**

AN action for libel tried before MEREDITH, J., and a jury, at Toronto, on the 9th and 10th April, 1900. The facts are stated in the judgment.

*E. F. B. Johnston*, Q.C., and *S. H. Bradford*, for the plaintiff.

*J. B. Clarke*, Q.C., and *Swabey*, for the defendants.

September 28, 1900. MEREDITH, J.:—

This is an action by a person occupying a public office—mayor of the city of Toronto—against one of the leading newspapers of that city, for damages for defamation of character.

There are two separate causes of action alleged, each for a libel said to have been published upwards of a year and a half ago—on the 31st December, 1898—when the plaintiff was an unsuccessful candidate for the office he now holds, and during that municipal election.

The case was tried before me, with a jury, on the 9th and 10th days of April last, at Toronto.

At the close of the plaintiff's case, and also at the close of the whole evidence, a motion was made for a nonsuit upon each branch of the action.

Judgment.  
Meredith, J.

I adopted the now quite usual course of taking a verdict, and of fully hearing and considering the motion, if necessary, after the verdict, so that, whatever might be the verdict or the judgment, another trial might be avoided.

The jury found for the plaintiff, and assessed the damages at \$50 upon each branch of the case—\$100 in all.

The motion for a nonsuit was then more fully argued, and a motion for judgment after verdict was made for the plaintiff, and I took time to consider the questions arising on both motions, mainly as to the proper practice in such cases.

At the time of the trial there was a strong impression upon my mind that the Court of Appeal in England had decided, in a case of *Adams v. Coleridge*, that, in circumstances such as of this case, the proper course was for the Judge to direct judgment to be entered in accordance with the verdict, leaving it to the defendant to move before a Divisional Court, or the Court of Appeal, to give judgment for the defendants notwithstanding the verdict, if the plaintiff ought to have been nonsuited.

The trial of the case of *Adams v. Coleridge* is quite fully reported.\* There Manisty, J., took precisely the same course as that followed at the trial of this case, and, after verdict for the plaintiff, directed judgment to be entered for the defendant, or, as it is generally termed, nonsuited the plaintiff.

After the most careful search and inquiry that I have, up to the present time, been able to make for any authorized report or information in confirmation or contradiction of the impression I have mentioned, I have been quite unable to find or obtain any, though there is a

\* (1884), 1 Times L.R. 84.

Judgment.

Meredith, J.

report in the *Law Times* of what took place in the Court of Appeal after the case had been settled between the parties—the missing part is the expression of opinion of the Court when the motion against the judgment of Manisty, J., was heard.

In the absence, then, of any authority in that case, how should I deal with the question?

Apart from authority, or supposed authority, to the contrary, I would have thought it the duty of the trial Judge, in such a case as this, where the consideration of the motion for nonsuit was postponed till after the verdict, to deal with that motion in just the same way as if dealing with it before verdict. The verdict cannot rightly affect the question. The jury's conclusion that the plaintiff ought to succeed in the action cannot add to the evidence in his favour—cannot rightly relieve the Court from its duty to determine whether there was any case made which entitled the plaintiff to go to the jury; and, besides this, the Judicature Act requires a Judge, sitting elsewhere than in the Divisional Court, to decide all questions coming properly before him, and not to reserve any case, or any point in a case, for the consideration of the Divisional Court, except in case of a previous known decision upon the same question with which he is unable to agree; then, in certain circumstances, he is to refer it to a higher Court.

Such cases as *Perkins v. Dangerfield* (1879), 51 L.T.N.S. 535, and *Connecticut Mutual Life Ins. Co. of Hartford v. Moore* (1881), 6 App. Cas. 644, are not, in my opinion, in point, though in some of them such general words as, that it is not competent in the trial Judge to direct judgment to be entered contrary to the verdict, are used. Upon examination all of them will, I think, be found to be cases in which the trial Judge had definitely overruled the motion for a nonsuit, and in probably all of them there was some evidence to go to the jury—they were cases in which a nonsuit could not rightly have been

directed at any stage of the trial—and that being so—there being a case for the jury—I am not aware of any power, in any Court, to direct judgment to be entered contrary to the verdict.

Judgment.  
Meredith, J.

I therefore feel bound to consider the motion for non-suit just as if the case had not yet gone to the jury, and I am fortified in that position by the opinion expressed by Moss, J.A., in a case very recently reported—*Floer v. Michigan Central R. W. Co.* (1900), 27 A.R. 122, at p. 127—an opinion which, indeed, seems to go much further—to indicate that not only ought the motion to be considered notwithstanding the verdict, but that, even had the motion been overruled and the case then submitted to the jury, it would be yet competent in the trial Judge to reconsider the motion and give effect to it; but that has not, so far as I am aware, ever been the practice.

Then, dealing with the case upon its merits, the plaintiff, as I have said, alleges two separate and distinct causes of action for libel.

In the first his complaint is, that the defendants charged him with having “entered into a corrupt arrangement” with one “Millar, whereby the plaintiff should use “the office of mayor, when elected, for private gain,” and with having “unlawfully and corruptly influenced or attempted to influence the said Millar to support him in the mayoralty campaign both financially and otherwise,” and with being “unlawfully and corruptly influenced” by said Millar “to use the said office of mayor to improperly advance the pecuniary and private undertakings of the said Millar.”

And the words alleged to have been published by the defendant, and upon which alone that complaint is made, are; “It can be readily understood what interest Mr. Millar has in the matter, and why he should make advances, hire committee rooms, and generally control the campaign, when \$4,000,000, which he controls, will be made available if E. A. Macdonald can be elected mayor.

Judgment.

Meredith, J.

In addition to this Mr. Millar has between \$7,000 and \$10,000 of claims against Macdonald, which in proceedings it was shewn under oath of Mr. Millar that he hoped to be paid, should he succeed in qualifying Macdonald for mayor, and then electing him."

The first question, therefore, is, whether the words to which such a meaning has been attributed will fairly bear that meaning, whether they are "reasonably capable" of the construction the plaintiff has, in his pleadings, put upon them; see *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. at p. 776, and *Nevill v. Fine Art and General Insurance Co.*, [1897] A.C. 68.

There is no evidence, apart from the article in which they appear, to shew that the words bear any other than their ordinary meaning; and that being so, how can it fairly be said that they impute "an unlawful and corrupt arrangement" already entered into between the plaintiff and Millar, or that Millar had "unlawfully and corruptly influenced the plaintiff" or that the plaintiff had "unlawfully and corruptly influenced Millar to support him financially and otherwise" in the mayoralty contest, or that the plaintiff had been "unlawfully and corruptly influenced" by Millar to use the office of mayor (to which he might never attain) "to improperly advance the pecuniary interests and private undertakings" of Millar? What is there to intimate that there has been any agreement or arrangement already made between these persons in respect of any of the matters mentioned in the innuendo? What is there to warrant the complaint of a charge of "unlawful or corrupt" conduct?

A suspicious mind may imagine wrong intended in the simplest and plainest of innocent words. But that is not the standard by which a defendant's conduct is to be measured. "It is not enough to say that by some person or another the words *might* be understood in a defamatory sense:" S.C., [1897] A.C. at p. 73. The question is, Has the plaintiff satisfied the onus of proof, as well as of

allegation, that the words used would convey, to reasonable minds of fair men who read them, the meaning he seeks to have put upon them?

Judgment.

Meredith, J.

It seems to me impossible to say that they would—impossible justly to say that the words would convey to such persons any other than their plain meaning. Millar's interests in the Aqueduct Company, and as a creditor of the plaintiff, account for his extraordinary conduct in paying the election expenses of the plaintiff, and otherwise in promoting his candidature. They both expect, or hope, if the plaintiff be elected, that the Aqueduct Company's aims will succeed to the great benefit of both Millar and the plaintiff, and it would be unsafe to elect a man to office whose private interests might conflict with his public duties, or who had private interests to serve, whether or not they conflict with public interests. But what warrant for the innuendo, that an unlawful and corrupt arrangement for the prostitution of the office had been made; or that Millar had been bribed by the plaintiff to support him, or the plaintiff bribed by Millar to prostitute the office? Any such ideas seem to me to be quite unnatural, and foreign to the words used, and, if they really existed in any mind, are attributable to the character, or disposition, or desire, of the man, rather than to the fair meaning of the words used.

Supposing the words used had been to this effect: "Macdonald and Millar are seeking the former's election in order to further the aims of the Aqueduct Company; they expect that, if that company's aims carry, Macdonald, as one of the promoters of it, will be greatly benefited and enabled to pay his debts, and Millar will make money as a shareholder in the company and also be enabled to recover the debt Macdonald owes him; it is against public interests that the aims of the company should succeed, and so it is unsafe to elect Macdonald." Could anyone have said that that was libellous? Surely not. The alleged libel in question goes no farther than, if it



Judgment.  
Meredith, J.

goes as far as, that, and that plainly would be true, and would obviously be fair comment upon a matter of public interest.

This branch of the case fails because the onus of proof of the innuendo alleged is not satisfied: there is no reasonable evidence to go to the jury that the words in question conveyed the meaning which the plaintiff, in his pleadings, attributes to them.

Then, upon the other branch of the case, the words complained of are:—"No man in Toronto has in a more dastardly or sneaking manner exposed the private life of citizens than Mr. E. A. Macdonald. The speaker gave the details of the payment to Mr Macdonald of \$4,500, and characterized the latter's behaviour in connection with the matter as blackmailing;" and the meaning attributed to them, by the plaintiff in his pleading, is, that the "plaintiff had committed a crime punishable by law," and "was a man unworthy of any position of trust," and "was a blackmailer."

I do not, at present, stop to consider to what extent, if any, the innuendo is justified by the words, or to what extent the creation of an imagination too desirous, or too suspicious, of strong accusations; for the case, so far as this motion, upon this branch of it, goes, may be determined upon the single and plain question—the only question raised at the trial—whether the plaintiff's conduct, referred to in the article, was rightly characterized as "blackmailing," the defendants having pleaded the truth of the words used.

It cannot, I think, make any difference, upon this question, that the defendants were only reporting, or purporting to report, the words of another. No one can escape the consequences of publishing a libel, or slander, because some other person is the author of it, and that is at the same time stated. Nor can it make any difference, for this purpose, whether the repetition, or report, of the words is accurate or inaccurate (that ques-

tion arises on a defence of fair and accurate report only). If the words used be true in substance and in fact, the plaintiff cannot recover. He sues for the injury his reputation has sustained by having his conduct falsely "characterized as blackmailing;" he can have no damages if it were truly so characterized.

The facts are simple, and are either not controverted, or incontrovertible; there is nothing material in dispute as to them; the one question is the applicability of the word "blackmailing" to them.

And the main material facts are these:—

The plaintiff, as a ratepayer of the city of Toronto, began an action to restrain the corporation of that city from entering into an agreement with a street railway company, upon the ground that a gross fraud was about to be perpetrated upon the corporation in the making of the agreement, which was to be carried into effect by means of bribery by members of the city council. The plaintiff had no manner of interest in the matter except as a ratepayer of the city, and champion of ratepayers' rights, and of the cause of municipal morality. He was bought off from prosecuting this action, for \$4,500, by those he accused of bribing members of the council. His silence, so far as that action was concerned, was purchased for that sum; and the price was paid to him. Very soon after that he sought and endeavoured to procure another large sum—\$15,000 or \$15,500—as the price of his silence in regard to the payment of the \$4,500 to him. He failed in that transaction, and then made public the other.

Now, how should one characterize such conduct? Should it be called "a business transaction," or "a clever scheme," or "a case of blackmailing"?

' \* There is no contention, nor any evidence whatever, that the word "blackmailing" has any other than its proper meaning in this community, or among the readers of the newspaper; and that being so, and the word being

Judgment.

Meredith, J.

Judgment. an ordinary English word, the Court will give to it  
Meredith, J. its natural meaning.

And everything, really, turns upon the meaning of the word: for the plaintiff it was very intelligibly put thus: the word imports a crime, and, whatever may be said of the plaintiff's conduct, it cannot be said that he was guilty of any crime; and it was said to have been so ruled at nisi prius, in another case of the same plaintiff against another newspaper in respect of the same, or like, words. If it were so ruled, I could not agree in that ruling; but if the decision were to me a known one, I would either follow it or refer the question to a Divisional Court, as the statute provides; but I cannot say it is a known one, and so am obliged to exercise my own judgment upon the question.

Then, it was said that it had been so decided in one of the Courts of one of the United States of America; and so it has: see *Edsall v. Brooks* (1864), 2 Robt. (N.Y.) 29: but one must exercise great care in seeking aid from such cases, because the peculiar circumstances surrounding them, and the local legislation affecting the question, so often differ them from the like cases here; one might almost say that it would be dangerous in any case, without much inquiry, to adopt the meaning attributed to a word or expression in different parts of the United States of America, knowing how often they differ, to some extent, from the exact meaning attributed to the same words here; and there is again the additional danger of other decisions in such Courts going the other way; a potent one in this case, as the decision relied upon has been differed from, and practically overruled, in the same case and Court, in a judgment which seems to me to deal with the question in a much more satisfactory manner: see *Edsall v. Brooks* (1865), 3 Robt. (N.Y.) 284; see also *Life Ass'n. of America v. Boogher* (1876), 4 Cent. L.J. 40.

But I have not to deal with the meaning of the word as used in the city of New York, nor as used in the

two ancient statutes (the one with an apparently criminal meaning, the other with a purely civil meaning) referred to in Blackstone's Commentaries. I have to deal with it as used in this country at the present day.

Judgment.

Meredith, J.

And there is no good reason, that I can perceive, for limiting its meaning to the case of the crime of extortion by threats, or any other crime. The word is seldom, if ever, used, in legal phraseology, in connection with crimes. It is not to be found anywhere in the Criminal Code; nor in any of the leading text books upon criminal subjects: see Russell on Crimes, Roscoe's Criminal Evidence, and Taschereau's Criminal Code—nor, indeed, in any legal work upon criminal law, that I have been able to examine, published in England or Canada; although it appears in most of the criminal law text books of the United States of America, and has been used in some criminal legislation in some of those States. So that it seems quite foreign to the criminal laws of Great Britain and of Canada; and I find it hard to understand how it can be thought, or with any degree of confidence contended by anyone, to have, or to have ever had, here or in England, a well defined criminal meaning.

Dr. Murray, in his New English Dictionary, gives as one of three meanings of the word "blackmail," "Any payment extorted by intimidation or pressure or levied by unprincipled officials, critics, journalists, etc., upon those whom they have it in their power to help or injure."

A definition quite wide enough to cover, even if it does not precisely fit, this case.

And of the words "blackmailer" and "blackmailing" he remarks that they are modern words referring chiefly to the levying of blackmail in the sense I have just quoted.

But it is not needful to attempt to define its whole meaning: it is enough to say, as I must, that where a man, having no right, nor any pretence of right, to receive one farthing (except his proper law costs, if he succeed in the

Judgment.

Meredith, J.

action), receives \$4,500 to hush a complaint of, and to stifle his legal proceedings to prevent, a wrong which he charges is about to be perpetrated by means of audacious bribery of public officers, his conduct may be "characterized as blackmailing" in the proper use and ordinary meaning of those words: indeed, it seems to me almost, if not quite, a typical case of blackmailing of the present day: and that is this case, except that this case is aggravated by a subsequent attempt to exact a larger sum.

Because, therefore, there is no evidence of the falsity of the words used, but, upon uncontroverted evidence, they appear to be, in substance and in fact, true, this branch of the case also fails.

And it may be also, that it fails on the grounds that the innuendoes are not sustained; that the meaning attributed by the plaintiff to the words in question, namely, that the plaintiff "had committed a crime punishable by law," and that he was "unworthy of any position of trust," and that he "was a blackmailer," cannot be supported.

The first is not, in my opinion, so, for the reasons I have given; as to the other two, I fail to perceive how any of the words can, in their ordinary sense, mean "a man unworthy of any position of trust" or that because in one instance his behaviour might be characterized as blackmailing, it can rightly be said "he was a blackmailer," which seems to imply one who practises blackmailing.

The plaintiff having chosen to put his own interpretation upon the words, and to bring the defendants down to trial upon that interpretation, and to try the case out accordingly, it may be doubtful whether he would be permitted subsequently to reject the innuendoes and rely upon the words (if untrue), having another libellous meaning, whether they are libellous in themselves or not: see *Williams v. Stott* (1833), 1 C. & M. 675, and the discussion of the question in a note to the report of the *nisi prius*

case of *Hunter v. Sharpe* (1866), 4 F. & F. 983, at p. 984.

**Judgment.**

The respective functions of Judge and jury are in an action of libel in no way different from such functions in other actions, except for the statutory provision, in favour of a defendant only, which I pointed out at the trial: R.S.O. 1897 ch. 68, sec. 2.

Meredith, J.

It is the duty of the Court to consider whether there is any reasonable evidence to go to the jury in support of the plaintiff's claim, and, if not, to dismiss the action: see *Ryder v. Wombwell* (1868), L.R. 4 Ex. 32, at pp. 35-9.

Judgment will be entered dismissing the action with costs.

E. B. B.

[DIVISIONAL COURT.]

FORSTER V. IVEY ET AL.

*Mortgage—Covenant of Mortgagor—Enforcement—Dealings between Mortgagee and Assignee of Equity.*

The relations which exist among mortgagee, mortgagor, and assignee of the land who has agreed to pay the mortgage, are not those which obtain among creditor, surety, and principal debtor.

*Aldous v. Hicks* (1891), 21 O.R. 95, approved.

Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor where no actual prejudice has arisen.

So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land; and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights.

*Mathers v. Helliwell* (1863), 10 Gr. 172, explained.

Dictum of Maclellan, J.A., in *Trust and Loan Co. v. McKenzie* (1896), 23 A.R. 167, dissented from.

*Barber v. McCuaig* (1897-8), 24 A.R. 492, 29 S.C.R. 126, followed.

THIS was an action brought by Harold Ernest Forster against Joseph Ivey and Alexander Gracey to recover the amount due upon a certain mortgage of lands, dated the 7th January, 1887, for eight years, made by the defendant

**Statement.**

Statement.

Ivey to the Accountant of the Supreme Court of Judicature for Ontario, and by the latter assigned to the plaintiff on the 1st May, 1890. The mortgage deed contained the usual covenant by the defendant Ivey that he would pay the mortgage money. The defendant Ivey sold the mortgaged lands to the defendant Gracey, and on the 14th February, 1889, conveyed the same to him, subject to the mortgage, the amount due thereon being assumed by the defendant Gracey and deducted from the amount of the purchase money. By deed of the 18th July, 1898, the defendant Ivey assigned to the plaintiff all and any of his right and rights of action against the defendant Gracey or any claim which he then had or thereafter might have against him in respect of the conveyance of the 14th February, 1889, or otherwise. The plaintiff alleged that the defendants were respectively liable to him for the amount due on the mortgage.

The defendant Ivey by his statement of defence alleged that when he sold the lands to the defendant Gracey, the latter became and had since remained primarily liable for the payment of the moneys secured by the mortgage; that since the time of such sale the plaintiff and his assignor had always dealt directly with the defendant Gracey and accepted him as the person primarily liable to pay the money secured by the mortgage, and had from time to time by agreement with the defendant Gracey but without the knowledge or assent of the defendant Ivey, extended the time for payment of the moneys secured by the mortgage and increased the rate of interest; that since the time of such sale the defendant Ivey was, to the knowledge of the plaintiff and his assignor, a surety only for the payment of the mortgage moneys, and until the 18th July, 1898, the defendant Ivey was never consulted by the plaintiff or his assignor or advised by them as to their dealings with the defendant Gracey in reference to the mortgage, nor had he any knowledge that the moneys secured by the mortgage had not been fully

repaid; that at the time of such sale, and also at the time when the principal became due, and for a long time thereafter, the mortgaged premises were ample security for the payment of the plaintiff's claim, and but for the negligence of the plaintiff a sufficient sum could have been realized from a sale to satisfy the plaintiff's claim.

The defendant Gracey did not defend.

The action was tried before FALCONBRIDGE, J., without a jury, at Toronto, on the 14th March, 1900..

A letter dated the 23rd May, 1895, from the plaintiff's solicitors to the agent of the defendant Gracey was given in evidence by the defendant Ivey, as follows: "The arrears of interest due herein amount to \$102.50, and for premiums of insurance paid by us on the 17th of May \$13.75, together \$116.25, which kindly remit. It is understood that the mortgage shall outstand until January next, when a small portion of principal is to be paid, and we will then grant a further extension on the understanding that similar portions of principal shall be paid off yearly."

The arrears were paid on the 3rd June, 1895, but nothing further was paid by the defendant Gracey, or any one, upon the mortgage.

This action was brought on the 13th September, 1898.

FALCONBRIDGE, J., gave judgment for the plaintiff from which the defendant Ivey appealed.

The appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ., on the 14th and 15th June, 1900.

*Hellmuth*, for the appellant, contended that he was released by the extension of time given by the plaintiff to the defendant Gracey, and that there was no reservation of rights against the appellant. He referred to *Trust and Loan Co. v. McKenzie* (1896), 23 A.R. 167; *Gorman v. Dixon* (1896), 26 S.C.R. 87; *Forbes v. Jackson* (1882), 19 Ch. D. 620.



**Argument.**

*D. W. Saunders*, for the plaintiff. This is not a case of principal and surety; the defendant Ivey is not a surety for Gracey, but has a right to indemnity against Gracey. The mortgagor is not hampered in redeeming if he has to pay, and that is all he can ask. There really was no extension, but, at all events, there was a reservation of rights against Ivey, who was called upon to pay by the plaintiff about the time of the alleged extension. I rely upon the actual decision of the Court in *Trust and Loan Co. v. McKenzie*, 23 A.R. 167, and upon *Barber v. McCuaig* (1897-8), 24 A.R. 492, 29 S.C.R. 126.

*Cattanach*, on the same side. The suspension of the right to redeem may be caused by the extension, but when the extended time has elapsed the right revives. In this case the extended time had elapsed when this action was brought. The mortgagor is not in so favoured a position as a surety. I refer to *Stark v. Reid* (1895), 26 O.R. 257, 264, and cases there cited.

*Hellmuth*, in reply, referred to *Mathers v. Hellivell* (1863), 10 Gr. 172.

October 8, 1900. BOYD, C.:—

The mortgage made by the defendant Ivey to the plaintiff fell due on the 10th January, 1895. Before this Ivey had sold the equity of redemption to Gracey, who by implication undertook to pay the mortgage. Default was made in payment, and Gracey asked for an extension of time till the next January, i.e., for a year, and offered to pay arrears of interest to the plaintiff. The plaintiff's solicitors, on the 23rd May, 1895, wrote to Gracey asking him to remit these arrears and some insurance, in all \$116.75, and added: "It is understood that the mortgage shall outstand till next January, when a small portion of principal is to be paid," etc. The arrears were paid on the 3rd June, 1895. This is the transaction relied on as shewing that time was given for the payment of the mortgage to

Gracey without reserving rights as against the mortgagor. And it is argued that, as, between Ivey and Gracey, the latter had to pay the mortgage, there is some relationship of principal and surety created, and the effect of thus giving time discharged Ivey, the so-called surety. The relations between mortgagee, mortgagor, and assignee of the land, who has agreed to pay the mortgage, are not those which obtain between creditor, principal debtor, and surety. This was intimated in *Aldous v. Hicks* (1891), 21 O.R. 95, and is more fully discussed in *Trust and Loan Co. v. McKenzie* (1896), 23 A.R. 167.

If there was any binding agreement to give time in this case, as against the assignee, it has long since expired. Apart from that extension of time, the mortgagor has no defence to the action; if he is called on to pay, he has full right of recourse both for money and land as against Gracey, his assignee. It does not seem to me expedient to extend the doctrine of discharge applicable to the case of an ordinary surety, to the case of a quasi-surety, such as the mortgagor in a case like this, when no actual prejudice has arisen and the grievance is merely theoretical. If, when the action is brought for the moneys against the mortgagor, his position is such that his right of indemnity against his assignee is not interfered with by any dealing between the mortgagee and that assignee, then there is the present right of recovery. Such appears to be the case in hand.

As to authorities, *Mathers v. Helliwell*, 10 Gr. 172, may be read so as to go as far as the defendant contends; but, I think its proper effect is merely to decide that, pending the arrangement for five years' extension which there existed between the mortgagee and assignee, and was current when the action was brought, it was not competent to make an immediate collection of the mortgage money from the mortgagor.

In *Trust and Loan Co. v. McKenzie*, 23 A.R. 167, MacLennan, J.A., appears to have thought that any giving

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Boyd, C.

Judgment.

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of time for payment to the assignee without a reservation of rights against the mortgagor, would discharge the latter. This position was not needful for the decision, and as a dictum I think it is of too comprehensive scope. When and so long as the equity of redemption is clogged by any agreement between the mortgagee and the purchaser of land mortgaged which interferes with the mortgagor's right to call for immediate indemnity from his purchaser, then there is no present right of action for the money on the mortgagor's covenant—though such a right may exist so as to be enforceable when the clog is removed. That I take to be the result of the decisions in *Barber v. McQuaig* (1897), 24 A.R. 492, and *S.C.*, in the Supreme Court (1898), 29 S.C.R. 126.

Upon default being made in the payment of the mortgage we are in the region of equities. So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee—his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land. It appears to be inequitable to allow him to set up effectively as a defence that some dealing has taken place between the mortgagee and the assignee intended to secure payment of the money, and for that purpose to give some extension of time, if the whole matter has ended and resulted in no detriment to the mortgagor.

Though, as between the mortgagor and his assignee, the former may be regarded as a surety, yet it is only for certain equitable purposes, and in order to work out certain equitable results as between them. It appears inexpedient to extend to such a transaction as the present the strict rules as to the discharge of sureties, which should be limited to cases where the technical relations of principal and surety exist.

The judgment should stand affirmed with costs.

FERGUSON, J.:—

Judgment.

Ferguson, J.

I concur in the judgment of the Chancellor.

MEREDITH, J.:—

If this were a case of principal and surety, I cannot doubt that the surety would be discharged by the giving of time to the principal debtor.

But, contrary to expressions of opinion in judgments in some cases in this Province, it is now, I think, settled, so far as this Court is concerned, that the position of a mortgagor, who has sold his equity of redemption and is entitled to indemnity from his purchaser against the mortgage, and his mortgagee, is not one of principal and surety, nor one to be dealt with as if a case of principal and surety, but is simply one of mortgagor and mortgagee, and controlled by the law applicable to such cases: see *Barber v. McCuaig* (2) (1900), 31 O.R. 593, and *Barber v. McCuaig*, 24 A.R. 492 and 29 S.C.R. 126.

My conclusions to that effect, and my reasons for them, were given at length in the Divisional Court case of *Watson v. Bell*, 2nd March, 1895, not reported.\*

\*WATSON V. BELL.

March 2, 1895. MEREDITH, J.:—

The trial of this case involved the consideration of the difficult and somewhat vexed question, whether a mortgagor is discharged from his covenant to pay the mortgage money by reason of the giving of further time for the payment of it by the mortgagee to the mortgagor's assignee of the equity of redemption, the assignee being under obligation to the mortgagor but not to the mortgagee to pay such money; whether, as between mortgagor and mortgagee, the mortgagor was, or was in the position of, a surety for his assignee; and, although in the view I take of the case, we might now avoid a reconsideration of that question, there being no appeal against the judgment in so far as upon this point it was in the mortgagor's favour, yet it will simplify the matter, and dispose of the several other questions raised, if we consider the learned trial Judge erred in this respect, and the question is distinctly raised by the mortgagee in what may, perhaps, be termed the main ground of his motion, that is, that he was released altogether—not only as to the one instalment—by the giving of time.

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**Meredith, J.**

Then, upon this important question, if answering it without taking time for consideration, one would be apt to say, "No, unless the assignee has also become debtor to the mortgagee, two debtors to the one creditor;" because one's general notion of a case of suretyship comprises at least two persons liable to the same creditor, and there is, ordinarily, no privity of contract between the assignee and the mortgagee, no liability on the former's part to the latter to pay the mortgage debt, but only the equitable obligation to the mortgagor to indemnify him against it. So that if the case be one of suretyship, not merely one of indemnity, it is a case of suretyship of an extraordinary character. In the ordinary case of suretyship the contract is not between the surety and the principal debtor, the surety and debtor each contracts with the creditor; here there is no contract by the assignee with either principal debtor or creditor, but only an equitable obligation on his part to indemnify the mortgagor, and the right in him to pay off the mortgage debt in manner provided in the mortgage, so that he may redeem the pledge. Ordinarily there is the primary liability on the part of the principal debtor, and the secondary liability on the part of the surety, to pay the creditor; here there is but the one liability, that of the mortgagor to the creditor; in no case can the creditor have recourse to the assignee of the equity for payment of the mortgage debt. Ordinarily the surety's liability cannot arise until the principal debtor has made default; the assignee can never make default in payment of the debt to the creditor, because, as before stated, he is not liable to pay it. Then there is the rule that no one is to be held as a surety beyond the precise terms of his engagement. So that it seems to me first impressions are not displaced, that the relationship of surety, on the part of the assignee of the equity, to the mortgagee for the mortgagor's debt cannot, in the ordinary sense, be here established.

But it is said that at all events a *quasi* suretyship exists. That, however, does not advance the argument, for a *quasi* suretyship has no legally defined meaning, and, in such a case as this, can mean only the actually existing relationship of the parties, the one towards the other, which, shortly stated, is, that the debt is due from the mortgagor to the mortgagee, the land is pledged as security for the payment of the debt, and the mortgagor has sold the pledge subject to the mortgage, a fact which in equity raises an obligation on the purchaser to indemnify the vendor against his liability for the debt, but creates no privity between the mortgagee and the purchaser—no liability on the latter's part to pay the former. The purchaser is, so far as contract goes, a stranger to the mortgagee. In the case of suretyship the right of the surety is to say to the creditor, "If the debt be not collected, the principal debtor may become insolvent; I do not want to run that risk; he should be sued at once." But the mortgagee cannot sue him; solvent or insolvent, he has no claim upon him, nor, perhaps, can the agreement not to enforce the claim against the land prevent the mortgagor pursuing his rights—paying his debt and claiming indemnity; the mortgagee may not have bound himself so that that shall not be done, but only that he will not

enforce the mortgage against the lands ; the mortgagor cannot compel him to so enforce it, nor can he himself take an assignment of it and enforce it unless it be, and until it is, fully paid off: see *Fraser v. Jordan* (1857), 8 E. & B. 303.

Accordingly it appears to me that the mere giving of time to the owner of the equity of redemption, without more, ought not to release the mortgagee from his covenant to pay the mortgage debt. And one should be slow to apply, beyond its well-defined bounds, the rule invoked, which sometimes works the plainest injustice. One should certainly be slow, unless clearly bound to do so, to apply the rule that one debtor is discharged by an extension of the time given to another debtor by the common creditor, where it can be shewn that not only did the giving of time not work injuriously to, but clearly was in the interests, and worked for the benefit, of the first mentioned debtor, as well as the creditor ; if it work to the injury of the mortgagor, then he does not need the aid of the rule ; to the extent of that injury at least he is relieved by the law of mortgagor and mortgagee, and that is enough.

Nor can I understand how the land can be called the debtor and the mortgagor and his assignee but sureties ; nor how the case would be altered if such a thing could be. The land is but the pledge, the mortgagor is the one debtor, and his assignee is his indemnifier, under an obligation implied in a court of equity, but to which obligation the mortgagor is a stranger without any right or power in it, or to enforce it.

Then, looking for a solution of the question whether the mortgagor has been released under the law relating to pledgor and pledgee, how does the case stand ?

If what took place between the mortgagee and the owner of the equity of redemption amounted to a novation, that is an end to the case at once ; the debt is shifted from the mortgagor to his assignee ; but nothing of that kind took place ; by a binding agreement between the mortgagee and the assignee of the mortgagor, the former agreed in effect that he would not enforce, against the lands, the mortgage, in respect of the first payment only, until some time after that payment fell due.

Now, the mortgagor's rights were to compel his assignee to indemnify him against that payment as well as against the rest of the mortgage debt. Upon non-payment of that instalment at the time provided for in the mortgage he was not entitled to pay off the mortgage and take an assignment of it and enforce it against the lands ; he was not entitled to insist upon the mortgagee taking advantage of the proviso that in default of one payment the other payments should become due ; he could not, if he had not sold his equity of redemption, have insisted upon that, and by assigning it he could not enlarge his rights under, he could not change the terms of, his contract. He has not shewn that he was in any way injured or prejudiced by the giving of time ; he concerned himself not at all about it ; and it does appear that the value of the lands was much enhanced through it, in the erection of the buildings and other improvements made upon them. If he had called upon

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his assignee to pay the instalment, and had failed to have that done by reason of the extension of time, his position would be very different. But that he did not; he did not look to the payment of his debt, nor to the enforcement of his equitable right against his assignee. He was no doubt perfectly satisfied that the mortgagee should not sue him for the debt, and the owner of the pledge, as well, to enforce a sale of it in satisfaction of [the debt out of the land, if he failed to recover from the debtor, but should extend the time for enforcing payment of that instalment, against the pledge, in order that its value might be greatly enhanced, as it was, by the erection of the buildings and the making of the other improvements. None of the rights of the mortgagor in regard to paying off the mortgage had been interfered with; when that time arrived the extension of time had long since elapsed, and there was nothing to prevent the mortgagee releasing the pledge or assigning it as the mortgagor might elect, upon payment of the debt.

The mortgagor's rights having, therefore, been in no way actually denied, nor in any way actually prejudiced, I can perceive no good reason for relieving him from any portion of his debt. The plaintiff can say: "I have never refused to receive payment of your debt, nor any part of it, from you; I have always been and am in a position to release, or assign as you may direct, your pledge, upon satisfaction of the mortgage debt"; and that being true, I quite fail to perceive any valid reason for relieving the mortgagor from any part of the mortgage debt.

But do the cases settle the question otherwise? If so, effect must be given to them. We are dealing with this question in a Divisional Court by way of appeal from the judgment at the trial. Is there any authority in point binding upon us? None was cited, and it is a matter of some weight against the mortgagor's contention that he has been unable to point to any such authority. It surely would have, somewhere at some time, been authoritatively stated, that the mortgagor, in such case, is a surety for his assignee, and entitled to all the rights of suretyship, including the right to claim to be discharged by giving of time to his assignee, if such really were his position in law or equity.

Giving heed and effect to that which is decided, rather than that which is said, in the cases relied on, none of them support the plaintiff's contention. In *Mathers v. Helliwell*, 10 Gr. 172, by a binding agreement between the assignee of the equity of redemption and the mortgagee, the mortgagor's right to redeem and take an assignment of the mortgage and to enforce it against the lands was postponed for five years; the mortgagee had put himself in such a position that he could not assign to the mortgagor that which it seemed he was entitled to have, namely, an assignment of the mortgage at maturity, and so he could not enforce payment from her. The agreement between the mortgagee and her assignee would be an answer to her action for foreclosure or sale of the mortgaged lands if the mortgage were assigned to her. The plaintiff was not in a position to restore the pledge or to assign to the mortgagor her rights in it. Whether rightly or wrongly decided the case is not in point. The judgment of the Chancellor in *Aldous v. Hicks* (1891), 21

O.R. 95, seems, to me to be expressly and clearly against the creation of the relationship of suretyship between the parties in this case. The observations of the same Judge at the conclusion of his judgment in *Muttlebury v. Taylor* (1892), 22 O.R. 312, at p. 315, I am unable to understand if they do not conflict with what was said by him in the other case. But time need not be taken to reconcile them, as, so far as I can see, there is nothing in the decision of that case requiring a conclusion that in any of these cases the mortgagor is a mere surety; and *Bristol, etc., Investment Co. v. Taylor* (1893), 24 O.R. 286, is not at all in point, for there the mortgagee, by the assignment of the mortgage under which the plaintiffs acquired their rights against the mortgagor, covenanted that he would pay the mortgage moneys if the mortgagor made default. A clear case of suretyship. In *Blackley v. Kenny* (1890), 19 O.R. 169, the difficulty of applying the law of principal and surety to cases of this character is made manifest, for there it seems to have been thought, not that the assignee of the mortgagor was the principal debtor and the mortgagor a surety, but that the assignee was a surety and that she was released by giving time to the mortgagor. The learned Judge, not going so far as to reverse the order of things contended for in the other cases, but striking a middle course, considered the land the principal debtor and the owner of the equity of redemption "a surety in respect of the land." A state of affairs which, as before mentioned, I am unable to comprehend. But upon the principles applicable to the law of mortgagor and mortgagee, I can perceive no difficulty in supporting the judgment in that case if the facts were as found by the learned Judge. The owner of the equity of redemption was bound in equity to satisfy the mortgage debt in manner provided in the mortgage for its payment, not according to the varied terms. She was bound to pay and at the same time entitled to a release of the mortgage and a discharge of the debt; the mortgagor released her from the equitable obligation to pay by putting it out of her power to pay according to her obligation, and the mortgagee put out of his power to enforce the mortgage because he was not in a position to be redeemed when she had a right to pay off the mortgage and discharge the debt under her equitable obligation and receive a release of the lands, so that by the new agreement made between the debtor and creditor the obligation and the lands were discharged. This case went to the Court of Appeal, where the appeal was allowed on a question of fact, and is reported there in a short note of the case only—(1891), 18 A.R. 135—by which no light is thrown on the right here involved; but it was said (in the argument of this case) that one of the learned Judges expressed an opinion that it is settled law that in such a case as this the relationship of principal and surety is created; that the mortgagor is surety to his purchaser for the payment of the debt. If this opinion were really expressed we cannot shelter ourselves behind it, the appeal being allowed on other grounds entirely—upon a question of fact; and I am compelled to say that all my efforts have failed to find any authority which would warrant us in holding it good law. The class of cases in which it is held that where one person

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mortgages his estate as surety for the debt of another, he is a surety and discharged by the giving of time by the mortgagee to the debtor, come one step towards the case in hand, but is different in the essential ingredient that in them there is privity of contract between the parties.

Neither does the recent judgment of the House of Lords in the case of *Rouse v. Bradford Banking Co.*, [1894] A.C. 586, help the mortgagor upon the question under consideration. The head-note of that case states that the decision was that "where two or more are indebted as principals and it is afterwards agreed between them that as between themselves one shall be a surety only, and this agreement is made known to the creditor, the rule as to the discharge of a surety by giving time to the principal debtor applies."

And the Lord Chancellor says that the question whether it was made out that time was given to those who became *principal debtors* is, of course, the question lying at the root of the defence; whilst Lord Watson speaks of *two or more full debtors*; so that that case, so far as it has any bearing on the point in this case, supports, rather than otherwise, the view that without the assignee as well as the mortgagor being debtor to the mortgagee the relationship of principal and surety would not exist.

Accordingly, I am of opinion that the relationship of principal and surety did not exist in this case, and that there is nothing in the law relating to pledges by which the mortgagor was released to any extent from his liability under the mortgage in question, and that, therefore, the mortgagor is not entitled to an assignment of the mortgage except upon payment of the whole mortgage debt.

There is no need for any consideration of the other questions raised upon this motion. Mr. English, for the plaintiffs, offering to give releases from the mortgages of the property, as well as an assignment of the mortgage in question, upon payment of the amount due to them, which seems a reasonable thing to do even though he be strictly right in his contention that those mortgages, if they affect this land at all, are subsequent to the mortgage in question, and cannot interfere with the mortgagor's rights under an assignment, for his benefit, of the mortgage in question. Upon that being sufficiently provided for, in the event of the mortgagor paying off and taking an assignment of this mortgage, this motion should, in my opinion, be dismissed with costs.

ROBERTSON, J., (the other member of the Court) concurred in the result, but for different reasons, unnecessary to refer to here.

What defence is there, then, to this action so treated?

The mortgagee sues the mortgagor upon the covenant, to pay the mortgage money, contained in the mortgage; and he is ready and willing to re-convey the pledge upon payment. What more can be asked?

It surely cannot be a defence to say: "If I had sought to redeem you at one time, you could not have given to me all that I then would have been entitled to from you."

No offer to pay was made; nor any demand then made upon the mortgagor.

It is not necessary to consider what would have been the effect of a tender of payment, or of an attempt to enforce payment, at that time; it is enough to say that until now no attempt or offer to pay, nor any attempt to enforce payment, has been made; and that now, when payment is sought, the mortgagee is able and willing to give the mortgagor all that he is entitled to receive.

For these reasons I would dismiss this motion.

E. B. B.

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[DIVISIONAL COURT].

EBY V. MCTAVISH.

*Bills of Sale and Chattel Mortgages—Hire Receipts—Transfer of Rights Under—Conditional Sale of Chattels—R.S.O. c. 148—Ib. c. 149.*

The purchaser of a piano under a hire receipt (by which the property was to pass to him only on completion of certain payments on account) before he had paid the required sum, agreed with his wife that she should purchase his interest and pay the balance due the vendors. There was no bill of sale registered nor such change of possession as required by the Bills of Sale and Chattel Mortgage Act, R.S.O. c. 148:—

*Held*, that the transaction was invalid as against execution creditors under s. 37 of that Act, and was not within s. 41, sub-s. 4, which is intended to except only conditional sales of chattels within R.S.O. c. 149, which this was not.

*Held*, however, that the wife was entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her.

THIS was an appeal by the claimant in an interpleader issue from the judgment of the County Court of the County of Perth, adverse to her claim to a piano which was one of the articles to which the issue related.

The piano had been procured by the husband of the claimant from the Bell Organ Co. under a hire receipt, by the terms of which, on the making of certain payments, amounting in the whole to \$265, the piano was to become the property of the husband, the ownership of it in the mean-

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Meredith, J.

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**Statement.** time remaining in the company, who were the manufacturers and whose name appeared upon the piano in the manner required by R.S.O. ch. 149, sec. 1, so as to dispense with the necessity of the filing of the hire receipt.

After making nine or ten payments the husband got into financial difficulties and was unable to make further payments, and, thereupon, it was agreed between him and his wife that the latter should purchase the interest of the husband in the piano and should make the payments which remained to be made to the company. There was no bill of sale executed, nor was there a change of possession of such a character as to dispense with the making and registration of a bill of sale so as to make the transaction valid as against subsequent purchasers and mortgagees if the Bills of Sale and Chattel Mortgage Act, R.S.O. ch. 148, was applicable to the transaction.

The learned Judge of the County Court held that the transaction fell within the provisions of sec. 37 of the last mentioned Act, and that the sale to the plaintiff was thereby rendered void as against the defendants, who were execution creditors of the husband.

The appeal was argued on May 15th, 1900, before MEREDITH, C.J.

*Mabee*, Q.C., for the plaintiff, the claimant.

*Idington*, Q.C., for the defendant.

The following authorities were cited on the question of the right of subrogation: *Brown v. McLean* (1889), 18 O.R. 533, and cases cited at p. 537; *National Fire Insurance Co. v. McLaren* (1886), 12 A.R. at p. 687; *Shinn v. Budd* (1862), 14 N.J. Eq. 235; *Webster and Goldsmith's Appeal* (1876), 86 Penn. 409; *McClure v. Andrews* (1879), 68 Ind. 97; *Robbins v. Rollins* (1888), 127 U.S. 622; *Caley v. Morgan* (1887), 114 Ind. 350; *Ely v. McNight* (1864), 30 How. Prac. (N.Y.) 97; *Marsh v. Webb* (1891), 21 O.R. 281\*; *McLeod v. Wadland* (1893), 25 O.R. 118.

\* Affirmed 19 A.R. 564; 22 S.C.R. 437.—Rep.

June 27th, 1900. MEREDITH, C.J. [After setting out the facts as above.]

Judgment.

Meredith, C.J.

We agree in the conclusion of the learned County Court Judge. It was contended by Mr. Mabee that the transaction was within the exception contained in sub-sec. 4 of sec. 41, R.S.O. c. 148, but we are unable to adopt that view.\* Sub-sec. 4 cannot be read as creating so wide an exception as that contended for, but was, we think, plainly intended to except only transactions to which the provisions of R.S.O. ch. 149 are applicable and therefore to operate in favour only of the persons mentioned in sec. 1 of that Act in the cases, and

\* R.S.O. c. 148, s. 41. (1). In case of an agreement for the sale or transfer of merchandise of any kind to a trader or other person for the purpose of resale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall as against creditors, mortgagees or purchasers be void, and the sale or transfer shall be deemed to have been absolute, unless

(a) The agreement is in writing, signed by the parties to the agreement or their agents, and

(b) Unless such writing or a duplicate or copy verified by oath is filed in the office of the County Court Clerk of the county or union of counties, or in the proper office in a district in which the goods are situated at the time of making the agreement, and also in the office of the County Court Clerk of the county or union of counties, or in the proper office in a district in which such trader or other person resides at the time of making the agreement, such filing to be made within five days of the delivery of possession of any of the goods under the agreement.

(2). [This section relates to where such agreements are to be filed in territorial districts.]

(3). Such an agreement, though signed and filed, shall not affect purchasers from the trader or person aforesaid in the usual course of his business.

(4). The provisions of this and the four next preceding sections of this Act shall not affect the case of manufactured goods and chattels which at the time possession is given have the name and address of the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, nor any goods or chattels where the receipt-note, hire receipt, order or other instrument is filed and for which cases respectively provision is made by The Act Respecting Conditional Sales of Chattels.

**Judgment.****Meredith, C.J.**

on the conditions there mentioned The transaction in question cannot, in any view of it, be brought within the provisions of sec. 1. There was no delivery of possession without the ownership of the property being acquired and no writing evidencing the transaction.

This suffices to make it clear that the exception relied on cannot be invoked in aid of the plaintiff's title to the piano.

I do not see, however, why the plaintiff is not entitled to be subrogated to the rights of the company to the extent of the payments made by her. The company was, in effect, a mortgagee of the goods to secure the sum due to them, and their title to the piano was not affected by the provisions of the Chattel Mortgage Act, but was valid as against the defendants. Though the plaintiff has not acquired a title to the goods by the purchase from her husband which she can assert against the defendants, I fail to see why she is not entitled to be treated as a purchaser of the mortgagee's interest in the piano to the extent of the payments which she made to the company, and to that extent it appears to me effect should have been given to her claim.

The appeal must therefore be allowed and the judgment varied accordingly.

As there has been but partial success by each of the parties there will be no costs of the appeal to either of them.

If the parties are unable to agree as to the amount paid by the claimant to the company, the case will go back to the County Court in order that the learned Judge of that Court may determine as to it.

ROSE, J.—I agree and refer on the question of subrogation to the Article under that caption in the American and English Encyclopædia of Law, where illustrations are given which justify the conclusion here arrived at.

MACMAHON, J. also concurred.

A. H. F. L.

## JONES V. LINDE BRITISH REFRIGERATION CO.

*Master and Servant—Secret Profits in Service—Costs—Jus Tertii.*

Profits acquired by the servant or agent in the course of or in connection with his service or agency fall to the master or principal.

The manager of a cold storage company, at the request of the company, undertook to advise a meat company as to some changes in their plant, and used his position of adviser to influence the purchase by the meat company of a new plant from the defendants, who had promised him a commission on any order they might receive through his assistance.

This was not disclosed to his employers or the meat company :—

*Held*, that the transaction was one in connection with his service as manager of the cold storage company, and he could not recover a commission from the defendants.

The defendants having at first conceded the plaintiff's right to recover, and then paid the money to the cold storage company, taking a bond of indemnity, the action was dismissed without costs.

THIS was an action to recover \$400 for commission upon the sale of a cold storage plant by the defendants to the Collingwood Meat Company. The plaintiff alleged that it was by means of his services that the defendants were enabled to make the sale.

*Statement.*

The defence was that at the time the plaintiff performed the alleged services he was in the employment of the Toronto Cold Storage Company, and that his ability to perform such services was the result of his employment by that company, and that his knowledge that the Collingwood Meat Company wished to buy a cold storage plant was acquired by reason of his employment.

The action was tried before BOYD, C., without a jury, at Toronto, on the 19th October, 1900.

*Riddell*, Q.C., for the plaintiff, referred to Wood on Master and Servant, 2nd ed., sec. 101 ; Schouler on Domestic Relations, sec 488; the cases there cited ; *Bloxam v. Elsee* (1825), 7 C. & P. 558 ; *Mason v. The "Blaireau"* (1804), 2 Cranch (U.S.) 240 (177).

*H. S. Osler*, for the defendants, cited Bowstead's Law of Agency, 2nd ed., p. 140 ; *Morison v. Thompson* (1874), L.R. 9 Q.B. 480 ; *Shipway v. Broadwood*, [1899] 1 Q.B.

Argument. 369; *Hovenden v. Millhoff* (1900), 16 Times L.R. 506; *Williamson v. Hine*, [1891] 1 Ch. 390.

October 24, 1900. BOYD, C.:—

The substance of the transaction is that the Cold Storage Company requested its manager (the plaintiff), who was the manager because of his acquaintance with the refrigerating process, to advise the Collingwood Meat Company as to the best course to adopt in making some changes in their plant. The correspondence shews that the plaintiff availed himself of this position of adviser to promote the interests of the defendants, who manufactured cold storage machinery, and who had promised to pay commission "on any order they might receive through the plaintiff's assistance."

He acquired the place of influence at the instance of the company whose manager he was, and the information he thus gained and communicated to the defendants facilitated to a greater or lesser extent the purchase subsequently made from the defendants. It is for these services—or this assistance—that the plaintiff seeks to recover his commission, and the defendants are willing to pay him. But the Cold Storage Company claim that this commission should enure to their benefit, because the plaintiff during the whole period was in their paid employment as manager, and it was by virtue of that position that he was enabled to render such effective assistance.

There was no disclosure made as to the promise of commission, nor was it known to the storage company or the Collingwood company.

In these circumstances it would seem to be the better view of the authorities to hold that the plaintiff cannot make a profit out of his assistance rendered at the request of the persons by whom he was employed.

The law on this point as to paid agents is expressed thus by Kekewich, J., in *Williamson v. Hine*, [1891] 1 Ch.

Judgment.

Boyd, C.

390, 393: "If he is called upon to do anything outside the terms of his agency, he is entitled to make a special bargain, or he can decline to do it unless he is compensated on a special footing; or he may do the work, and, provided everything is fair and above board, he probably would be allowed some fair remuneration according to some recognized measurement of the value. But if he does anything within the terms of his agency, however uncompensated it may seem to him personally, he can neither charge for it in his account nor can he secretly take any commission for it." I would venture to regard this case as one in which, by the request of the president of the storage company, the advising as to the storage plant was considered as part of the plaintiff's duties as officer of the Cold Storage Company, and the position of trust thus accepted by him precluded him from secretly accepting commission from the defendants. The American decisions cited are not so farreaching as those from the English Courts, but the latter are of authority in our Courts. The English rules arose, no doubt, out of cases of apprenticeship, but they are held to apply to all cases of employment as servants or agents, so that profits acquired by the servant or agent in the course of, or in connection with, his service or agency fall to the master or principal: *Morison v. Thompson* (1874), L.R. 9 Q.B. 480, 483.

As I regard this transaction, it was one in connection with the service of the plaintiff as manager of the Cold Storage Company.

The action is dismissed, but without costs, as the only defendants on the record have by their written admissions conceded the plaintiff's right to recover. Then they paid the money to the storage company, taking a bond of indemnity, and so in effect I have had to consider the *jus tertii*. The money, having reached the hands of the principal, cannot be recovered by the agent—nor should the defendants be called on to pay twice.

E. B. B.



## [DIVISIONAL COURT.]

HILL V. INGERSOLL AND PORT BURWELL GRAVEL  
ROAD CO.*Contract—Road Company—Implied Covenant—Corporate Seal.*

- An agreement in writing signed by the plaintiff and by the superintendent of the defendants' road, but not under seal, and not purporting to be made by the defendants, who were an incorporated road company, was in part as follows:—"I"—the plaintiff—"have this day agreed with" the defendants "to furnish good gravel and deliver the same in the centre of the road bed . . . and the company agree to pay me at the rate of \$2.40 per cord. . . . And it is further agreed that my tolls . . . shall be free during the full term of this agreement. And it is further agreed that in consideration of this agreement and for the sum of \$1 . . . I do . . . discharge all claims I hold against the company . . . . And it is further agreed that this agreement for gravel to hold good as long as the company keep the road and as long as my gravel holds good . . . ."

*Held*, that an agreement on the part of the defendants that they would take from the plaintiff all the gravel they should require for the portion of their road referred to in the writing, as long as he was able and willing to supply it, was not to be implied from the terms of the writing; and the taking of gravel from another person was not a breach of the agreement.

*Held*, also, *per* FERGUSON, J., that to bind the corporation by an executory contract to purchase from the plaintiff all the gravel required for a portion of their road for an indefinite and protracted period, would require an agreement under their corporate seal.

**Statement.**

An action for damages for a breach of a contract alleged to have been made between the plaintiff and the defendants, an incorporated company.

The document relied on as containing the contract was not under seal; it was signed by the plaintiff, and by one Edwin Gray, the superintendent of the defendants' road; and was as follows:—

"Ingersoll, November 4th, 1892.

"I have this day agreed with the Ingersoll and Port Burwell Gravel Road Company to furnish good gravel and deliver the same on the centre of the road bed, commencing at the corporation line at Ingersoll bridge, then south as far as Hagel's Corners, and I agree to keep the same in

Statement.

a good state of repair, at all seasons of the year, and I agree to repair at any time when notified by the company or their superintendent so to do, and the company are at liberty to place a man on the road to receive the gravel and assist in placing the same on the road bed, or assist in loading at the pit, and I agree to pay one-half of his wages, and the company agree to pay me at the rate of \$2.40 per cord for all gravel delivered as per this agreement, and to pay for the same as follows:—one-half to be paid during this coming winter, and the balance to be paid during next summer. And it is further agreed that my tolls at gates Nos. 1 and 2 shall be free during the full term of this agreement. And it is further agreed that in consideration of this agreement and for the sum of \$1 to me in hand paid (the receipt is hereby acknowledged) I do hereby exonerate and forever discharge all claims I hold against the company for the filling up of my gravel pit and fencing the same as per written agreement between the company and myself. And it is further agreed that this agreement for gravel to hold good as long as the company keep the road, and as long as my gravel holds good. And it is further agreed that the company allow me to take earth out of the road to assist me in filling my pit, but I am not to injure the company's road, and I agree to leave the same where the earth is taken in the shape of a ditch on the road side, and the superintendent to decide the amount of gravel put on the road each year."

The plaintiff alleged that for several years after the making of the agreement he provided gravel at the request of the defendants in pursuance of the agreement, and was paid therefor, but that in or about the month of November, 1899, the defendants, in breach of the agreement, purchased gravel for keeping their road in repair from one Harris, and placed it on their line of road between the corporation line at Ingersoll bridge and Hagel's Corners, although the gravel was still good in the plaintiff's pit, and he was able and willing to perform his

**Statement.** part of the agreement ; and the plaintiff claimed damages for this alleged breach.

The action was tried at Woodstock on the 28th February and 1st March, 1900, before ARMOUR, C.J., who found as a fact that good gravel could be got out of the plaintiff's pit, but not taking it as it came ; that the plaintiff could make it good gravel by screening it or either picking out the boulders or having them crushed ; but held, that the action was not maintainable ; that no covenant on the part of the defendants to take all the gravel from this plaintiff was to be implied from the agreement ; citing *Aspdin v. Austin* (1844), 5 Q.B. 671, and *The Queen v. Demers*, [1900] A.C. 103 ; and he, therefore, dismissed the action with costs.

From this judgment the plaintiff appealed, and his appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ., on the 13th and 15th June, 1900.

*F. A. Anglin*, for the plaintiff. Under such a contract as that in question it must have been the intention of both parties to assume reciprocal obligations, and a covenant on the part of the defendants to take all their gravel from the plaintiff as long as he shall be able to supply it will be implied. Unless such implication is made, the plaintiff will have relinquished a valuable claim for no consideration. The cases of *Aspdin v. Austin*, 5 Q.B. 671, and *The Queen v. Demers*, [1900] A.C. 103, relied on by the Chief Justice, are distinguishable from this. The decisions which govern this case are : *Wood v. Copper Miners' Co.* (1849), 7 C.B. 906 ; *Churchward v. The Queen* (1865), L.R. 1 Q.B. 173, 195-197 ; *Hornsby v. St. Luke's Vestry* (1860), 2 L.T.N.S. 176 ; *Pilkington v. Scott* (1864), 15 M. & W. 657 ; *The Queen v. Welch* (1853), 2 E. & B. 357. Upon the evidence the Chief Justice's finding might have gone farther as to the supply of gravel in the plaintiff's pit. We are able and willing to furnish good gravel.

The defendants have no right to say in advance that the plaintiff cannot furnish good gravel and so they will take it from some one else.

Argument.

*Riddell*, Q.C., and *V. Sinclair*, for the defendants. Under the contract the defendants are not bound to take any gravel at all: *Midland R. W. Co. v. London and North Western R. W. Co.* (1866), L.R. 2 Eq. 524, 529; *The Queen v. Demers*, [1900] A.C. 103; *Dunn v. Sayles* (1844), 5 Q.B. 685; *Aspdin v. Austin*, *ib.* 671; *MacGregor v. Sully* (1900), 31 O.R. 535. The agreement to pay is significant. If the agreement said that the plaintiff was to supply no one else, it would be a different affair. The clause in the agreement as to the time for which it should "hold good" was introduced in ease of the plaintiff. The contract should, at any rate, be read as being for only one year. The contract, not being under the corporate seal, and being executory, is not binding on the defendants: *Buffalo and Lake Huron R. W. Co. v. Whitehead* (1860), 8 Gr. 157; *Wingate v. Enniskillen Oil Refining Co.* (1864), 14 C.P. 379. Upon the evidence, the gravel in the plaintiff's pit is not good.

*Anglin*, in reply. An early clause in a contract may be enlarged by a later: Pollock on Contracts, 6th ed., p. 385; Leake on Contracts, 3rd ed., p. 190. *Emmens v. Elderton* (1853), 13 C.B. 495, shews in what cases an implication will be made. *Hornsby v. St. Luke's Vestry*, 2 L.T.N.S. 176, is on all fours with the present case, and is good law. The contract is of the necessary and ordinary kind to be made by the defendants, and need not be under seal. The defendants accepted the benefit of the contract; it is not wholly executory: *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581; *Clarke v. Cuckfield Union Guardians* (1852), 21 L.J.N.S.Q.B. 349; *Australian Royal Mail Steam Navigation Co. v. Marzetti* (1855), 11 Ex. 228.

Judgment.

October 8, 1900. BOYD, C.:—

Boyd, C.

"Although a contract may appear on the face of it to bind and be obligatory only upon one party, yet there are occasions on which you must imply—although the contract may be silent—corresponding and correlative obligations on the part of the other party in whose favour alone the contract may appear to be drawn up . . . . But in all these instances, where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent:" *per* Cockburn, C. J., in *Churchward v. The Queen*, L. R. 1 Q. B. at p. 195.

The formal frame of the instrument is to be regarded first of all. It is not under seal, and begins, "I have this day agreed with the Ingersoll and Port Burwell Gravel Road Company," etc. That personal element (*i.e.*, the single contract of the plaintiff) controls the first sentence, which contains half the whole writing. The remaining sentences begin, "and it is further agreed." The contents of these relate to "*my* tolls being free during the full term of this agreement:" to the exoneration of the company from a claim "for filling up *my* gravel pit;" "that the company allow *me* to take earth out of the road to assist in filling *my* pit;" and "that this agreement for gravel hold good as long as the company keeps the road, and as long as *my* gravel holds good."

Now, if the company was a party to the agreement and authenticated it in a proper manner—which is not now the case, as it has merely the name of the superintendent of the road to it—it may be that this method of expression would bind the company as to the executory engagements mentioned in it. But, as it stands, these words bind only the plaintiff as to what he has agreed to do or what he has agreed shall be done on his part: *Ramsden v. Smith* (1854), 2 Drew. at pp. 307, 308.

This incorporated company is not bound by this sort of promissory engagement, even if the language was more express and explicit than it appears to be: *Garland Manufacturing Co. v. Northumberland Paper and Electric Co.* (1899), 31 O.R. 40: what gravel they receive under the arrangement they must pay for: what they refuse to receive when tendered, or what they decline to order for the road, they are not liable for, for lack of a binding contract.

Judgment.

Boyd, C.

But, coming to the substance of the agreement itself, I do not think we should add any clauses to it by way of implication. I agree with the construction put upon it at the trial, and think that the Chief Justice rightly held that it fell under the authority of *Aspdin v. Austin*, 5 Q. B. 671: see, also, *Williamson v. Taylor* (1843), *ib.* 175. The plaintiff had the gravel *in situ*; he had no preparation to make to supply it; and did not change his position in any way on faith of this contract. He was open to sell to others, and cannot force upon the company an engagement to take all this gravel from him and to take material from no other source. This would impart a stringency to the contract very different from the fair meaning of its present terms, and would be fettering the corporation beyond their intention.

Though some adverse comments have been made upon *Aspdin v. Austin*, it has been recognized and quoted from with approval in the Privy Council and other high Courts of the nation: see *per* Sir James Colville in *Pallikelagutha Marcar v. Sigg* (1880), L.R. 7 Ind. App. at p. 105; *per* Cockburn, C.J., in *Churchward v. The Queen*, L.R. 1 Q.B. at p. 191.

The judgment is affirmed with costs.

FERGUSON, J.:—

The defendants are a duly incorporated gravel road company. The plaintiff brings his action, alleging that on the 4th day of November, 1892, it was agreed between him and the defendants that he, the plaintiff, was to furnish

Judgment.

Ferguson, J.

good gravel and deliver the same on the centre of the road bed on the road belonging to the defendants, commencing at the corporation line of Ingersoll bridge, then south as far as Hagel's Corners, and that the defendants agreed to pay him, the plaintiff, at the rate of \$2.40 per cord for all gravel delivered according to the agreement, and that it was further agreed in and by the agreement, which was in writing, that the agreement for gravel was to hold good as long as the defendants kept the road, and as long as his, the plaintiff's, gravel should hold good; that, for several years after the making of the agreement, the plaintiff provided gravel at the request of the defendants, in pursuance of the agreement, and was paid therefor, but that in or about the month of November, 1899, the defendants, in breach of the agreement, did purchase gravel for keeping their road in repair from one Harris, and placed the said gravel on their said line of road between the corporation line at Ingersoll bridge and Hagel's Corners, although the gravel was still good in the plaintiff's pit and he was able and willing to perform his part of the agreement. The plaintiff claims damages for this alleged breach of the agreement by the defendants.

The defendants, amongst many other defences, deny the making of the agreement, and say that, if there was such an agreement there was no breach of it by them.

The alleged agreement was produced at the trial. It is a paper signed by the plaintiff and one Edwin Gray, as superintendent of the defendants' road. It consists mainly of promises on the part of the plaintiff, there being in it no promise of importance here, so far as I see, on the part of the defendants, except the one to pay for the gravel that should be delivered as *per* the agreement, and the one in respect to the agreement holding good so long as the company should keep the road and the plaintiff's gravel should hold good; and it is not denied that all the gravel that was delivered by the plaintiff has been paid for.

Judgment.

Ferguson, J.

It was contended on behalf of the plaintiff that there should be inferred or implied a promise or obligation on the part of the defendants that they would under this agreement take all the gravel they should require for this portion of their road from the plaintiff. The plaintiff does not appear to be precluded by the agreement from disposing of his gravel to other people.

This subject is referred to by Cockburn, C.J., in a case cited by counsel for the defendants, *Churchward v. The Queen*, L.R. 1 Q.B. at p. 105, where the learned Judge, after referring to instances where obligations would be implied, said: "But in all these instances, where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it is intentionally silent; and, above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties." This the learned Judge said he took to be a sound and 'safe rule of construction with regard to implied covenants and agreements which are not expressed in the contract.

Adopting, then, this rule, which it is manifest should be adopted, and seeking to study out the alleged contract in all its parts, I am not able to see that any promise or obligation on the part of the defendants not expressed in the document and material to the contention here should be inferred or implied. This matter does not really seem, in the view that I take of the case, to be of importance, and I have said this much about it because so much attention was paid to it in the argument of the motion.

The agreement, as will be seen, professes to provide that the defendants shall take the gravel from the plaintiff as long as the defendants should keep the road and the plaintiff's gravel should hold good. This would be an important and far reaching agreement. As before stated,



Judgment.

Ferguson, J.

the document is not under the seal of the corporation, the defendants.

The rule formerly existing that a corporation aggregate can only contract under their seal has been relaxed in many respects, and now, as it appears, admits of an exception, amongst others, where the making of the contract is necessary and material to the purpose for which the corporation was created: see *Clarke v. Cuckfield Union Guardians*, 21 L.J.N.S.Q.B. at p. 351; *South of Ireland Colliery Co. v. Waddle* (1869), L.R. 4 C.P. 617. There are many authorities on the subject. The original rule that there must be the seal in order to the validity of the contract of a corporation aggregate still obtains, except so far as exceptions have been grafted upon it.

In the present case it may well be said that the purchase of gravel in the ordinary way would be incidental to the purposes for which the defendants were incorporated, and that such a purchase might be made without employing the seal of the corporation. But that would be a thing, as it appears to me, quite different from what is contended for in this case, viz., to bind the corporation by an executory agreement not under their seal to purchase all the gravel required for the described portion of their road, from this plaintiff, for and during what might and probably would turn out to be an indefinite and very protracted period of time. "So long as the defendants should keep the road and the gravel in the defendant's pit should hold good" might be a very long period of time, and I am clearly of the opinion that such a contract cannot properly be considered as incidental to the purpose for which the defendants were incorporated. It is, as I think, widely different from the ordinary contract for the purchase of gravel. It might turn out to be almost in perpetuity. I can arrive at no other conclusion than that to bind these defendants in that way would require an agreement under the corporate seal. In the present case, there being no

such agreement, the plaintiff cannot, as I think, succeed ; and I think the judgment appealed from should be affirmed, and the appeal dismissed with costs.

Judgment.

Ferguson, J.

MEREDITH, J.:—

The plaintiff's claim really is, that the defendants have no right to repair or renew their road, except with gravel purchased from him, so long as he is able to furnish it of the quality agreed upon.

The parties, fortunately, put their agreement in writing ; and, though not very well constructed or worded, that writing shews, in somewhat minute detail, the terms of the contract.

From such writing it is plain enough that the plaintiff agreed to supply such gravel as long as he had it and the defendants kept the road ; the agreement which was to hold good was the plaintiff's agreement to sell at the stipulated price ; but one searches in vain for any sort of an expression of any sort of an agreement that the defendants were to take it, and take none other, for the same or any other period.

What right have we, then, to read into the agreement such a thing ? To act as if the parties had so agreed, and had expressed, in their somewhat comprehensive writing, such an agreement ?

Can anyone doubt that, if they had so agreed, that agreement would have been expressed in the writing ?

The plaintiff's contention is, that such an agreement ought to be implied. But why ?

We have no power to make a new agreement between the parties : no power to add to or take from their real contract : and we should take care that we do not.

We may, and are bound to, hold parties to that which plainly must have been their agreement, whether read out of, or between, the lines, or, to state it more aptly, if it can be found upon the construction of the whole document read in the light of the surrounding circumstances.

## Judgment.

Meredith, J.

The rule is thus stated by the Vice-Chancellor Kindersley in *Iven v. Elwes* (1854), 3 Drew. 25, 34: "The doctrine which is to be collected from all the cases is involved in much difficulty. It is not always possible to see what is and what is not sufficient to raise an implied agreement. This, however, is a plain, intelligible, sensible, and settled rule; that whereas you never ought to imply a covenant against the intention of the parties, so it goes further, and you ought not to imply an agreement unless in the fair and honest construction of the deed it appears that it was the intention of the parties, or unless it is absolutely necessary to imply it; and when it is said you ought not to imply a covenant unless it is necessary, that must be taken to mean when it is necessary in order to carry into effect the intention of the parties, that it should be implied."

It is difficult to assign to any particular rule, or reason, the grounds upon which all of the cases, upon the subject of implied obligations, have been decided; but it would be much more difficult to shew how most of those in which effect was given to such obligations, could, in any court of justice, have been otherwise decided.

But whether the obligation is to be gathered from the whole writing, having regard to all the surrounding circumstances: or whether to be considered the tacit agreement to be gathered from the words and acts, or acts alone, of the parties, in all the conditions and circumstances of the case: or as a pure fiction of law invented in order that natural justice may be done, or to prevent a violation of common sense, or as merely an equitable obligation raised by a court of equity upon the conscience of a litigant, whose conscience needs building up, I fail to perceive why effect should be given to the claim in this action.

There is nothing extraordinary in a person, having an ordinary commodity to sell, and desiring to obtain or retain a good customer, agreeing to sell it, so long as it lasts, at a fixed price: nor, indeed, in the converse of such a case.

We need not consider how it would have been had the plaintiff contracted with the defendants not to sell any of the gravel to anyone except them. He has not so agreed, nor does he even suggest that he ever considered himself so bound; and so analogy to any of the cases cited for him seems to me to be wanting: and he was at last obliged to rest his claim, upon the argument before us, on the fact that he had released a disputed claim of about \$100, and the suggestion that he is without consideration for that, unless effect is given to his extraordinary claim in this action.

But even that (whatever it might otherwise amount to) is not so: he got or retained a good customer, and he got the agreement to free him from tolls, which agreement has hitherto been carried out.

I therefore agree in the judgment at the trial, and would dismiss this motion, without stopping to consider whether the contract is one not binding upon the defendants because not under their corporate seal, or how the question of fact as to the quality of the gravel ought to have been found.

E. B. B.

Judgment.

Meredith, J.

## BOOK V. BOOK ET AL.

*Life Insurance — Change of Beneficiary — Preferred Class — Beneficiary for Value — R. S. O. ch. 203, secs. 151, 159, 160 — Will — Testamentary Capacity — Premiums Paid by Beneficiary.*

A person whose life was insured by a benevolent society in favour of his wife, who was a beneficiary for value, though not stated to be so in the certificate, was unable or unwilling to keep the insurance in force, and the later assessments before his death were paid by the wife. By his will the assured gave the whole of the insurance moneys to one of his sons :—

*Held*, that he had power to do so by virtue of sec. 160 of the Ontario Insurance Act, R. S. O. ch. 203, the proviso at the end of sub-sec. (2) shewing that the section is applicable to the case of a beneficiary for value, and that those only who appear as such expressly in the policy are protected against the wide power to change beneficiaries conferred by the section.

It was conceded that the wife should have a return of all moneys paid by her to keep the certificate in force, with interest.

**Statement.**

THIS was an action brought by Amanda C. Book, the widow of Robert O. Book, against Solon D. Book, John F. Beamer, Samuel Whittaker, and the Ancient Order of United Workmen, to recover from the last named defendants the sum of \$2,000, in respect of a certain certificate of insurance issued by them upon the life of the plaintiff's deceased husband, and for a declaration that a certain paper writing purporting to be the will of her deceased husband, whereof the defendants Beamer and Whittaker were the executors, and whereby he, the deceased, purported to give or bequeath the money arising from the aforesaid insurance to the defendant Solon D. Book, one of his sons, was not the last will and testament of the deceased, and for revocation of the letters probate, issued to the executors, or for a declaration that the bequest to the defendant Solon D. Book was inoperative against the plaintiff.

The defendant society paid the sum due under the certificate into Court, and were discharged from the action.

The other defendants joined in one defence.

The facts are stated in the judgment.

The action was tried at the Hamilton non-jury Sittings on the 18th June, 1900.

Statement.

*Teetzel, Q.C.*, and *George C. Thomson*, for the plaintiff.

*W. W. Osborne* and *M. J. O'Reilly*, for the defendants who defended.

August 29, 1900. MEREDITH, J.:—

The material facts of this case I find to be as follows :

The plaintiff is the owner of a farm of 100 acres; a gift from her father to her, many years ago.

She and her husband mortgaged that farm to raise money for his purposes; and they both covenanted to pay off the mortgages.

At the time of the husband's death there was due upon such mortgages about \$2,000.

As between husband and wife, the husband was the principal debtor, and the wife was his surety only, in respect of such mortgage debt.

The husband, being unable to pay the debt, procured the benefit certificate in question, and had it made payable to the wife, for the purpose of having his debt, charged upon her land, paid by means of it.

The husband became unable, and afterwards unwilling because the certificate was payable to his wife, to pay the assessments upon the certificate, and the wife, with the assistance of some of their children, who in turn were assisted by relations to some extent, thereupon and thereafter till the husband's death, paid them, and kept the certificate in force; and since the death the amount of it—about \$2,000—has been paid into Court, by the benevolent society which issued it, for the benefit of the person entitled to it.

Before his death the husband quarrelled violently with his wife, and those of his children living at home, and they with him; the origin of these unhappy differences in the family being, I think, the thwarting, by the wife and these

Judgment.

Meredith, J.

children, of his desires and endeavours to raise money for improvident purposes and to incur improvident debts.

Some time before his death he became desirous of and endeavoured to alter the object of the certificate, or to annul it altogether, for the purpose of preventing the proceeds being applied in payment of the mortgages, and to compel his wife to pay the mortgage debt herself, or lose her land by reason of it.

Eventually he made the will in question, for the purpose and with the intention of depriving his wife of all the benefit the certificate was intended to give her, and of leaving her and her land burdened with his debt. He left no other means out of which it could be paid.

The will gives to one of his sons, and one who had not for many years lived at home, and who ordinarily would not have been the object of his father's bounty to any great extent, if to any extent, the whole of the money in question.

Notwithstanding these findings the defendants contend that the provisions of the will must prevail, giving to this son the \$2,000 in question, and leaving the widow and mother to pay the testator's \$2,000 debt.

The provisions of the Ontario Insurance Act are relied upon, and they certainly seem to support the contention, to warrant the son taking away the whole benefit of the certificate from the widow, who is not only one of the persons particularly intended to be aided by the Act, but is also a "beneficiary for value," and a person who will be wronged to the extent of \$2,000 if the contention prevail.

The case comes unquestionably under sec. 160 of the Act; it is a case of substitution of one preferred beneficiary for another.

Apart from the facts that the wife was a beneficiary for value, and that the later assessments were not paid by the husband, there was clearly the right to change the

benefit from the wife to the son; this section plainly so allows.\*

Judgment.

Meredith, J.

It is not necessary to consider what the effect of the wife being a beneficiary for value would have been had the Act been silent upon the subject.

There is the express provision that the assured shall not, by virtue of this section, divert the benefit from the original beneficiary where the policy expressly states that the beneficiary is a beneficiary for value.†

This shews that the section is applicable to the case of a beneficiary for value, and that those only who appear as such expressly on the policy are protected against the wide power to change beneficiaries conferred by this section.

For the plaintiff it was contended that, even though the testator had power under sec. 160 to divert the benefit from wife to son, because it did not appear upon the certificate that the wife was a beneficiary for value, the wife's right was preserved under secs. 151 and 159, neither requiring the fact of being a holder for value to be expressed on the policy or otherwise by writing; that there is a conflict in this respect between the provisions of sec. 160 and of secs. 151 and 159; and that the latter ought to prevail.

But sec. 159 does not apply to a case of this kind; it applies only to a pledge of a policy before it has been declared to be for the benefit of any preferred beneficiary.

And sec. 151 is one applying to the subject of insurance on one's own life for the benefit of another generally; and is not to be read as conflicting with sec. 160, if that can fairly be avoided; and I think it can; that effect should be

\* R.S.O. 1897 ch. 203, sec. 160—(1) The assured may, by an instrument in writing . . . vary a policy or declaration . . . so as to restrict or extend, transfer or limit, the benefits of the policy to the wife alone or to the children, or to one or more of them, or to the mother or any other preferred beneficiary of the assured, as a beneficiary or sole beneficiary . . . and whatever the assured may, under this section, do by an instrument in writing . . . he may also do by a will . . .

† R.S.O. 1897 ch. 203, sec. 160. sub-sec. (2), proviso.



Judgment.

Meredith, J.

given to both, as it substantially can, by holding sec. 160 to be applicable to the cases specially provided for in it, that is, a change confined to the class called preferred beneficiaries, and the other section to a change in all other cases.

It may be that the Legislature especially desired to discourage and prevent false claims, and false swearing in support of them, and contradictory swearing, whether the claim be false or true, by and between persons so nearly related or connected as those of the preferred class, for it is only in the case of a change in that class that the Act requires evidence of value given to be in writing upon the policy.

Though, in the peculiar circumstances of this case, the result can hardly be what the Legislature had in mind, or what is satisfactory to any fair mind, I can see no means of escape from the defendants' contention, upon this branch of the case, and must give effect to it.

Upon the other branch of the case the action also fails.

I am unable, upon the whole evidence, to find that the testator's mind was affected by insane delusions respecting his wife and some of his children. That he was embittered against them enough to, at times, wish that that which he said against them was true, is very likely. Perhaps the strongest bit of evidence against him was the fact of his having gone to a magistrate and made the complaint against his wife, but the magistrate seems to have had no great difficulty in convincing him of the unreasonableness of the charge, and in dissuading him from taking any further steps respecting it. That he could not have done if the man were insane upon the subject. Grievous bitterness and ill temper there certainly were, but not mania.

During the trial the question occurred to me, whether there might not be found to have been an abandonment of the husband's insurance upon his own life, and the substitution of an insurance by the wife upon his life. But there is really no evidence of that; it was the original insurance,

by husband for the benefit of wife throughout; only that the premiums were paid by the wife. Possibly the society could not, or would not, insure the life of even a member at the instance, and for the benefit of, another.

So that upon all the main grounds the plaintiff fails, and her action must be dismissed.

But I understood it to be conceded that the plaintiff should have a return of all moneys paid by her, or her children who were living with her, to keep the certificate in force, with interest; if so, judgment will go in her favour for the proper amount, to be ascertained by the judgment clerk if the parties are unable to agree as to it: if not, the matter must be mentioned again.

An order may go for payment out of Court, of the money in Court to the credit of this action, in accordance with the judgment.

My discretion upon the question of costs is exercised by making no order as to them.

Proceedings will be stayed until the 15th September next, if either party desire it.

E. B. B.

Judgment.

Meredith, J.

## REGINA V. RANDOLPH.

*Criminal Law—Theft—Summary Trial—Excessive Penalty—Amendment—Discharge—Further Detention—Criminal Code, secs. 752, 783, 787, 800.*

The defendant was prosecuted for stealing \$5 in money, the property of one J.M., contrary to the form of the statute, etc., and the charge was heard and determined in a summary way by a police magistrate:—

*Held*, that the prosecution fell under sec. 783 (a) of the Criminal Code, the value of the property being less than \$10, and it not being charged that the offence was "stealing from the person;" and therefore sec. 787 applied, and the magistrate had no power to impose a penalty of imprisonment for longer than six months.

The provisions of the Code respecting amendments to summary convictions do not apply to summary trials; and the provisions of sec. 800 do not apply where the same infirmity is found in the conviction as in the commitment.

The conviction and commitment were bad for imposing an unauthorized penalty; the defendant was entitled to be discharged upon *habeas corpus*; and an order should not be made under sec. 752 for his further detention.

**Statement.**

ON the 24th October, 1900, *DuVernet* moved before **FERGUSON, J.**, in Chambers, for an order for the issue of a writ of *habeas corpus* to bring up the body of John Randolph, who had been committed to the Central Prison, under sentence of imprisonment for two years, less one day, for theft. A copy of the warrant of commitment produced shewed that the prisoner was convicted by the deputy police magistrate for the city of Toronto, for that he, the said John Randolph, did on the 22nd day of September, 1900, steal \$5 from one Jennie McCoy.

The order was granted.

The writ having been issued, *DuVernet* moved, on the return of it, before **FERGUSON, J.**, in Chambers, on the 26th October, 1900, for an order for the discharge of the prisoner, contending that the sentence could not legally be for more than six months' imprisonment, referring to *Regina v. Conlin* (1897), 29 O.R. 28; that the deputy police magistrate had no jurisdiction at all in a case of this kind; that the commitment and conviction were bad on

account of the absence of the word "unlawfully;" that the warrant was bad because it did not state whose property the money was; and that it was void for uncertainty because the money was not described, referring to *Regina v. Barnes* (1866), L.R. 1 C.C.R. 45.

*J. R. Cartwright*, Q.C., and *J. W. Curry*, Q.C., for the Crown, cited *Regina v. Archibald* (1898), unreported,\* as to the jurisdiction to impose a sentence longer than six months; *In re Parker* (1890), 19 O.R. 612, as to the jurisdiction of deputy police magistrates; and *Regina v. Gibson* (1898), 29 O.R. 660, as to amendment of the conviction.

*Du Vernet*, in reply, referred to *Regina v. Rose* (1896), 27 O.R. 195, as to the penalty.

October 31, 1900. FERGUSON, J.:—

In the view that I have taken of the case, I do not see that it is needful that I should consider or determine the question so elaborately argued regarding the status of the deputy police magistrate in reference to certain provisions of the Criminal Code.

The defendant was prosecuted for unlawfully stealing five dollars in money, the property of one Jennie McCoy, contrary to the form of the statute, etc., etc.

I am of the opinion that the prosecution fell clearly under the provisions of section 783, paragraph (a),† the

\* In *Regina v. Archibald*, decided by a Divisional Court (Rose and MacMahon, JJ.) on the 8th December, 1898, the motion before the Court was to quash a conviction by a police magistrate for an aggravated assault. The defendant elected to be, and was, tried summarily. The conviction adjudged that he should be imprisoned in the Central Prison for twelve months. The Court held that the magistrate did not exceed his jurisdiction by sentencing the prisoner to a term of imprisonment longer than six months—referring to secs. 540, 539, 262, 783, and 785, of the Criminal Code; and to *Regina v. Boucher* (1879), 8 P.R. 20, and *Regina v. Conlin*, 29 O.R. 28.

† 783. Whenever any person is charged before a magistrate,

(a) with having committed theft, or obtained money or property by false pretences, or unlawfully received stolen property, and the value of

Judgment.  
Ferguson, J.

value of the property alleged to have been stolen being less than \$10, it not being charged that the offence was "stealing from the person." †

In such a case the provisions of sec. 787, I think, apply; and these seem to be that the magistrate (the word "magistrate" includes a police magistrate), after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for a term not exceeding six months.

The present conviction imposes a penalty of imprisonment in the Central Prison for the Province, there to be kept at hard labour for the term of one year and three hundred and sixty-four days.

The provisions respecting amendment in cases of summary convictions do not, as I think, apply to this case, which is a case of summary trial.

The provisions of sec. 800 \* as to amendments, etc., cannot, as I think, apply, because the same infirmity is found in the conviction and the commitment.

I think that both the conviction and the commitment are bad for imposing and professedly authorizing a penalty not warranted: see *Wood v. Fenwick* (1842), 10 M. & W. 195, referred to in the last edition of Paley on Convictions, p. 219. It is stated in the earlier editions of Paley that after the return to the *habeas corpus* is put in and read, as it was in this case, it is considered as filed; yet the property alleged to have been stolen, obtained or received, does not, in the judgment of the magistrate, exceed ten dollars, . . . the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

† See sec. 344; *Regina v. Conlin*, 29 O.R. 28.

\* 800. No conviction, sentence or proceeding under the provisions of this part (LV., summary trial of indictable offences) shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same.

Court may still amend the return, though the conviction cannot be amended.

Judgment.  
Ferguson, J.

In the circumstances of the case, I think I am not called upon to act, and I think I should not act, under the provisions of sec. 752 of the Code.†

The conviction and commitment, being, as I think, bad, should be set aside. The defendant is, therefore, imprisoned without proper authority and contrary to law, and should be discharged from custody.

A condition, however, is that no action is to be brought by him or on his behalf in respect of such imprisonment.

E. B. B.

† 752. Whenever any person in custody charged with an indictable offence has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise, to have the legality of his imprisonment inquired into, such judge or court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice under whose warrant he is in custody, or any other judge or justice, to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice.

## LANGLEY ET AL. V. VAN ALLEN ET AL.

*Bankruptcy and Insolvency—Assignments and Preferences—Secret Agreement—Onus—Voluntary Payments—Attack on—Assignee for Creditors—Privity.*

In an action by certain creditors of an insolvent and by his assignee for the general benefit of creditors to recover from the defendants, who were also creditors of the insolvent, certain sums of money paid by the insolvent to the defendants before the assignment under the terms of an alleged secret agreement:—

*Held*, that the onus of proof was on the plaintiffs.

*Held*, also, that, the payments not being procured by unjust oppression or extortion on the part of the plaintiff, but being voluntary, the assignee could not recover.

Review of English cases on this point.

Nor could the other plaintiffs, not being the whole body of creditors, recover, even when using the name of the assignee as plaintiff by virtue of an order under R.S.O. ch. 147; and no privity such as would give a right of action was established between the creditor plaintiffs and the defendants by an agreement for an extension of time for payment entered into by these plaintiffs and defendants and the insolvent, before the alleged secret agreement.

**Statement.**

THIS was an action brought by Tooke Brothers and others, creditors of one James A. Sword, in their own names and in the name of James P. Langley, assignee for the benefit of Sword's creditors, by virtue of an order under R.S.O. 1897 ch. 147 allowing them to use the name of the assignee as plaintiff, for their own benefit, against E. Van Allen & Co., to set aside an agreement made between the defendants and Sword, and for other relief.

The statement of claim alleged: (3) that on the 16th August, 1899, Sword was indebted to the plaintiffs the creditors, and being financially embarrassed and unable to meet his liabilities in full as they matured, applied to them to grant him an extension of time for payment of certain portions of their claims against him, alleging that he would be able to meet all his liabilities, provided the plaintiffs and defendants (who were also creditors of Sword) agreed to extend the time; (4) that, relying upon the representations made by Sword, and upon the express understanding and agreement that all the plaintiffs and defendants would in good faith grant the extension, the

Statement.

plaintiffs entered into an agreement in writing with each other and with Sword, dated the 16th August, 1899, for an extension of time for payment of notes maturing after that date, with the proviso that such agreement should be valid and binding only when signed by the plaintiffs and defendants (naming them) within one week from the date of the agreement; (5) that this agreement was duly signed by the plaintiffs in Montreal and delivered to Sword in order that he might procure the consent and signature thereto of the defendants, who lived at Hamilton; (6) that the defendants, before signing this agreement, persuaded Sword to enter into a secret collateral agreement with them, dated the 23rd August, 1899, whereby, in consideration of the defendants signing the first agreement, Sword covenanted and agreed that he would, as they became due, pay to the Eagle Knitting Company, Limited, or order, the amount of six promissory notes on that day made by Sword in favour of such company for \$118 each, payable at short dates thereafter, and that if default should be made in payment of any of these notes, the whole amount of the indebtedness of Sword to the defendants at the date of such default should become due and payable, and the defendants should become released and discharged from the agreement of the 16th August, 1899; (7) that the defendants procured Sword to give the six promissory notes mentioned to the Eagle Knitting Company in trust for the defendants, who then signed the agreement of the 16th August, 1899, which the plaintiffs then regarded as operative and acted upon; (8) that the plaintiffs had no notice or knowledge of the secret agreement until long afterwards; (9) that on the 16th October, 1899, Sword, being in insolvent circumstances and unable to pay his liabilities in full, executed and delivered to the plaintiff Langley an assignment of his estate for the general benefit of creditors; (11) that, in pursuance of the secret agreement, Sword paid the defendants the six promissory notes, amounting in all to \$708, which sum was part of the



**Statement.** defendants' claim, the payment of which they had nominally agreed to extend by the agreement of the 16th August, 1899; (12) that the defendants had filed their claim with the plaintiff Langley upon the estate for \$1,436.57, all of which, with the exception of \$76.25, was part of their claim against Sword as it stood on the 23rd August, 1899, and claimed to be paid dividends thereon out of the funds of the estate; (13) that the plaintiffs were willing that the defendants should rank upon the estate for \$76.25, being the amount of an account for goods sold by the defendants to him subsequent to the 23rd August, 1899; but they submitted that, by reason of the fraudulent dealings of the defendants with Sword in respect of the extension agreement, their claim, except as mentioned, had been released or postponed to the claim of the plaintiffs and could not rank in competition with them upon the estate, and that the defendants were bound to account for and repay to the plaintiffs \$708 and interest; (14) that on the 6th July, 1899, Sword consigned to the defendants a quantity of shirting of the value of \$126.73, which the defendants declined to accept upon the terms required by Sword, and the same remained in the defendants' possession, the property of Sword; (15) that the plaintiff Langley demanded possession of this shirting on the 18th November, 1899, but the defendants pretended that they had manufactured it into shirts, and stated that they were prepared to deliver such shirts to him on payment of the amount due them for manufacturing the same, for which amount they claimed a lien on the shirts. The plaintiffs therefore prayed: (1) that the agreement of the 23rd August, 1899, be declared fraudulent and void and set aside; (2) that the defendants should be ordered to pay to the plaintiffs the \$708 and interest; (3) that it should be declared that the defendants' claim for \$1,436.57, except as mentioned, had been released and postponed to the plaintiffs' claims; (4) delivery of the shirting to the plaintiff Langley or payment of the value thereof.

Statement.

The statement of defence alleged: (2) that Sword voluntarily entered into the agreement of the 23rd August, 1899; (3) that the defendants had no communication with the other signatories of the agreement of the 16th August, 1899, either before or after the signing thereof by them (the defendants), nor did they directly or indirectly make any overtures or promises to such other signatories to induce them to sign the same; (4) that the other signatories had not given Sword the extension mentioned, but, on the contrary, they, or some of them, persuaded and compelled him to assign, and proved their claims against his estate, and thereby released the defendants; (5) that when the defendants signed the agreement of the 16th August, 1899, they had every reason to believe, as the fact was, that Sword was solvent and would be able to pay his creditors in full; (6) that had Sword's estate been liquidated in the ordinary course of business, it would have paid all the claims of his creditors in full, but the plaintiffs prevented its being so sold by forcing Sword to assign; (7) that any payments made by Sword to the defendants were lawfully made after the signing of the agreement of the 23rd August, 1900; (8) that the plaintiffs had disclosed no cause of action; (9) that the shirting came lawfully into the defendants' possession, and was never demanded by the plaintiffs or any of them; (10) that the defendants, at the request of Sword, manufactured the shirting into shirts, and for material and labour expended were entitled to \$168, and had offered and had always been ready and willing to deliver the shirts on payment of such sum.

The action was tried before BOYD, C., without a jury, at Toronto, on the 19th October, 1900.

*George Kerr*, for the plaintiffs.

*Lynch-Stawnton*, Q.C., for the defendants.

Judgment.

October 24, 1900. BOYD, C.:—

Boyd, C.

The action is to get repayment of \$708 as paid to the defendants under the terms of a secret agreement said to be in contravention of the assignee's and creditors' rights.

In any event, this sum must be reduced by \$236.88, leaving a balance of \$471.12, because by the terms of the creditors' arrangement the extension of time was limited as to notes maturing after the 16th August, 1899, and this note for \$236.88 was due (including the days of grace) on the 15th August.

The evidence is very limping as to some material matters. It is not shewn that the extension arrangement was signed within one week from its date by the defendants; there was no stipulation for secrecy; and it is not proved that the agreement was not mentioned to the plaintiffs, whereby the defendants were to be paid old bills which had matured in July and August, amounting to the above \$471.12 (though renewed paper had been taken for them and was current at the time); nor does it appear clearly for how much the defendants were giving time, as understood by the plaintiffs the creditors, nor is it to be inferred that they would have been influenced by the claim of the defendants to be paid this \$471—having regard to the balance owing the defendants for which they were willing to give time—and the large number of outstanding creditors, over \$2,000 in amount, who were not asked to come into the particular arrangement. In these respects the onus of proof rests on the plaintiffs: see *per* Alderson, B., in *Davidson v. McGregor* (1841), 8 M. & W. 755, 768.

But, assuming sufficient proof as to these preliminaries, I do not see how on the merits the plaintiffs can recover. First of all, as to the assignee (one of the plaintiffs), to whom Sword, the debtor, assigned under the statute on the 16th October, 1899. He is seeking to invalidate a transaction apparently fairly entered into as between

Sword and the defendants. It is very clear that Sword himself could not impeach this completed transaction; and this assignee does not occupy any better position (the element of actual fraud being eliminated, as it is by the evidence.) The evidence imports a business dealing between Sword and the defendants. His statements and figures shewed at the time abundant solvency; he said he had arranged his affairs for the payment of the overdue liabilities which he afterwards paid to the defendants, and he entered voluntarily into the so called secret agreement of 23rd August. And after this he communicated with the co-plaintiffs, Montreal creditors—he having undertaken to get the extension arrangement signed by the defendants last of all the signatories. Then in due course he made payment of the six notes for \$708 now in question, and these were all paid and satisfied, the last on the 30th September.

Now, the assignment was on the 16th October, and the insolvency must have arisen some time between that and the 23rd August. The cause is disclosed in Sword's evidence: he was running two stores, and lost money trying to close one. But I have no doubt that he and the defendants treated on the reasonably assumed and believed condition of his solvency, and that he could meet all payments if he could get eased off a little. Sword went on with his business, and bought other goods from the defendants and made his payments.

The notes for \$708, as pleaded by the plaintiffs, were made to the Eagle Knitting Company in trust for the defendants: paragraph 7. These notes were not produced or proved, but it is in evidence that they were held or retained by the defendants in their vault, and were met by Sword weekly by cheques made payable (so far as the \$471.12 is concerned) to the order of the defendants. This appears to me neither more nor less than a plain voluntary payment deliberately made of the six notes in the hands of the defendants, which estops the plaintiff

Judgment.

Boyd, C.

Judgment.

Boyd, C.

from now seeking to regain the money, as obtained in fraud of anybody.

This fact of voluntary payment of the six notes prior to the assignment is conclusive against the assignee's right to sue. The cases relied on by the plaintiffs depend on the doctrine of extortion and unjust oppression when the debtor is in straits. That is the pith of *Smith v. Cuff* (1817), 6 M. & S. 160, on which *Alsager v. Spalding* (1838), 4 Bing. N.C. 407, rests. The other case which was acted on in 4 Bing. N.C.—*Turner v. Hoole* (1822), D. & R.N.P.C. 27—is expressly overruled in *Wilson v. Ray* (1839), 10 A. & E. 82. But it appears from a note to *Gibson v. Bruce* (1843), 5 M. & G. at p. 402, that *Turner v. Hoole* is misreported, and that the securities were there outstanding in the hands of a stranger, against whom there was no defence. *Wilson v. Ray* decides that, even if securities are given in fraud of creditors, yet if judgment and payment is obtained thereon without the defence of illegality being raised, or if payment is voluntarily made, as here, with knowledge of all the facts, it is too late to re-agitate the matter afterwards, thus solemnly or deliberately ended by satisfaction of the liability. I do not see that the authority of *Smith v. Cuff* is affected by the decision of Hall, V.-C., in *Re Lenzberg's Policy* (1877), 7 Ch.D. 650, 654, or by *Atkinson v. Denby* (1862), 7 H. & N. 934. The difference is pointed out in Sm. L.C., 10th ed., vol. II., p. 430.

It was said that the assignee's name only is used as plaintiff, an order having been obtained by the other plaintiffs—some of the creditors—to use his name for their sole behoof. But his name will not avail them, and their suit, as sole claimants of the \$708 to the exclusion of the other creditors, is not to be encouraged. They have no separate right of action, for, by the hypothesis of litigation, all the creditors are the body injured. But what privity is there, as between the different signatories, to give a right of action in such a case as this by some

against one? The money has been well paid by one competent to pay, and these particular creditors have no right to recall it for themselves.

Judgment.

Boyd, C.

The action failing at the suit of the debtor or his assignee, there appears to be no competency in the rest of the plaintiffs to maintain the litigation, and the action stands dismissed with costs.

The contemplated particular creditors' arrangement fell through, and the assignment for creditors generally supervened—under which I take it that the defendants have the right to rank *pari passu* with all the creditors for the balance of their debt; but this it is not necessary now to decide.

As to the shirting, I find no sale was made of that to the defendants by Sword—but that it was made up into shirts and collars for Sword, and that the defendants are entitled to be paid for this before handing over the shirts. Practically, there is nothing in this claim for anybody, as the expense of making-up is greater than the value of the original material.

E. B. B.

## RE RYAN.

*Administration Order—Discretion to Refuse—Rules 946, 954—Fund—Savings Deposit—Survivorship.*

There is now a discretion under Rules 946 and 954, in dealing with applications for administration orders, and the Judge or officer is not obliged to grant a summary order unless it appears that some good result will follow.

Order refused where the widow of an intestate was clearly entitled to a fund which was the only matter in dispute.

Where a husband deposited money with a savings company and caused an account to be opened in the name of himself and his wife jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by her evidence, uncontradicted, that money of hers went into the account and that both drew from it indiscriminately :—

*Held*, that she was entitled as survivor to the whole fund.

**Statement.**

AN application by Ellen McCluskey and others, nieces and nephews of Patrick Ryan, deceased, for a summary order for the administration of his estate, upon the ground that Ellen Ryan, his widow and the administratrix of his estate, neglected to distribute the estate amongst those entitled.

Patrick Ryan died intestate on the 17th March, 1897, and this application was launched on the 5th September, 1900.

The facts are stated in the judgment.

The motion was heard by BOYD, C., in Chambers, on the 5th October, 1900.

*W. T. J. Lee*, for the applicants.

*Home Smith*, for the administratrix.

October 8, 1900. BOYD, C.:—

The husband deposited money with the Home Savings Company, and caused an account to be opened entitled "Patrick Ryan and Ellen Ryan jointly (husband and wife) to be drawn by either, or in the event of the death of either, to be drawn by the survivor." The wife has survived, and claims the balance of the money,

\$1,400. She said that money of hers went into the account, and that she and he drew from it indiscriminately. There is no evidence to contravene what would be the proper deduction from this transaction and course of dealing standing *per se*, and that is, that the survivor was to take the whole. It was during the joint lives joint property with right of sole ownership and property to the survivor. The cases are clear and all one way in favour of the wife's claim as survivor. It was not at the death part of the husband's estate, but passed to her in her own right: *Low v. Carter* (1839), 1 Beav. 426; *Dummer v. Pitcher* (1833), 2 My. & K. 262; *Talbot v. Cody* (1875), Ir. R. 10 Eq. 138, a very elaborate and well-considered judgment (in which *Marshal v. Crutwell* (1875), L.R. 20 Eq. 328, is put on special grounds—as it is in like manner explained in *Re Eykyn's Trusts* (1877), 6 Ch.D. 121); *Re Young* (1885), 28 Ch.D. 705.

This fund appears to be the only matter in dispute, and as I think the widow is entitled to it—but not as part of the estate of the deceased—there appears to be no reason for burdening the estate with the expense of administration.

There is now a discretion in dealing with these applications, and I am not obliged to grant a summary order unless it would appear some good result would follow: Rules 946 and 954.\*

I dismiss the application, and, if the parties failing are dissatisfied and proceed to litigate further adversely, I dismiss it with costs.

E. B. B.

\* 954. It shall not be obligatory on the Court or Judge or local Master to pronounce or make a judgment or order, whether on any summary application or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order.

Judgment.

Boyd, C.



## [DIVISIONAL COURT.]

## JONES V. TOWNSHIP OF STEPHENSON ET AL.

*Municipal Corporations—Damages—Non-repair of Highway—Notice of Accident—Joint Liability—Waiver.*

The notice of the accident and the cause thereof required by sec. 606 (3) of the Municipal Act, R.S.O. ch. 223, to be given within thirty days after the accident, must now, by 62 Vict. (2) ch. 26, sec. 39, be given to each of the municipalities where the claim is against two or more as jointly responsible for the repair of the road. *Leizert v. Township of Matilda* (1899), 26 A.R. 1, is therefore not now applicable.

Where notice in writing was given to one township municipality of two sued as jointly liable, and not to the other, but it appeared that the reeve of the latter had been verbally notified by the plaintiff and had then promised to write and had written to the reeve of the former, after which both reeves attended with the plaintiff and examined the place of the accident, and the reeve of the latter afterwards wrote to the plaintiff advising him that the township corporation did not recognize his claim because it was considered that the loss arose from the fault of the plaintiff; and all this within thirty days after the accident :—

*Held*, that there was no waiver.

**Statement.**

MOTION by the plaintiff to set aside a nonsuit entered at the trial by the Judge of the District Court of Muskoka, and for a new trial, in an action in that Court against the municipal corporation of the township of Stephenson and the municipal corporation of the township of Macaulay to recover damages for the loss of a horse owing to the alleged non-repair of a highway running between the two townships.

The defendants pleaded that notice of the action and the cause thereof was not given, as required by R.S.O. 1897 ch. 223, sec. 606 (3); but the Judge at the trial allowed them to amend by adding a reference to 62 Vict. (2) ch. 26, sec. 39, which adds a new sub-section (4) to the former provision, and which applies to the case of two or more municipalities jointly responsible for the repair of the road; and then nonsuited the plaintiff because notice was not given to the township of Macaulay, although it was given to the other township.

Statement.

The motion was heard by a Divisional Court composed of MEREDITH, C.J., and MACMAHON, J., on the 3rd October, 1900.\*

*Lindsey*, Q.C., for the plaintiff. Want of notice must be pleaded. It was not properly pleaded in the first instance here, for sub-sec. (3) of sec. 606 does not apply to a case of this kind: *Leizert v. Township of Matilda* (1897-9), 29 O.R. 98, 26 A.R. 1; and an amendment should not have been allowed for the purpose of enabling the defendant to set up an unmeritorious defence. Even if the amendment was properly allowed, the notice was waived by the conduct of the defendants: *Park Gate Iron Co. v. Coates* (1870), L.R. 5 C.P. 634; *Clarkson v. Musgrave* (1882), 9 Q.B.D. 386.

*Du Vernet* and *A. A. Mahaffy*, for the defendants, cited *Employers' Liability Assurance Corporation v. Taylor* (1898), 29 O.R. 104; *Longbottom v. City of Toronto* (1896), 27 O.R. 198; *Thorpe v. Priestnall*, [1897] 1 Q.B. 159; *Conroy v. Peacock*, [1897] 2 Q.B. 6; Rule 271.

November 12, 1900. MACMAHON, J.:—

Appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Muskoka, who at the trial directed that judgment of nonsuit be entered. The notice of appeal asks that the judgment be set aside, and for an order directing that judgment be entered for the plaintiff for the sum of \$200 and costs.

The action is to recover the value of a horse which was injured on the town line between the townships of the two defendants, caused, as it was alleged, from the negligence of the defendants in permitting a culvert in the highway to remain in disrepair. The injury to the horse was of such a nature that it became necessary to kill it.

Although the learned Judge of the District Court gave no written judgment, it appears that the nonsuit proceeded

Judgment.

MacMahon, J.

upon the ground of want of notice of the injury being given to the corporation of the township of Macaulay, as required by sub-sec. (3) of sec. 606 of the Municipal Act, R.S.O. 1897 ch. 223, as amended by 62 Vict. (2) ch. 26, sec. 39.

Section 606, sub-sec. (3), provides that no action shall be brought to enforce a claim for damages for injuries occasioned by reason of a highway not being kept in repair unless notice in writing of the accident and the cause thereof "has been served upon or mailed through the post office to the mayor, reeve or other head of the corporation, or to the clerk of the municipality within thirty days after the happening of the accident where the action is against a township." And the amendment made by 62 Vict. (2) ch. 26, sec. 39, adds to sec. 606 the following as sub-sec. (4):—"Where the claim for damages is against two or more municipalities jointly responsible for the repair of the road, street, bridge or highway, no action shall be brought to enforce such claim under this section unless the notice to each of the municipalities jointly liable has been served or mailed as provided in sub-section 3 within the period or periods therein mentioned."

This amendment was made in consequence of the decision of the Court of Appeal in *Leizert v. Township of Matilda* (1899), 26 A.R. 1.

The horse was injured on the 25th January, 1900, and on the 26th the plaintiff wrote Thomas Howard, the reeve of the township of Stephenson, notifying him of the loss and cause thereof. No notice in writing was served upon or mailed to the reeve or clerk of the township of Macaulay. But on the 26th January the plaintiff saw William Nasmith, the reeve of Macaulay, and informed him of the loss of his horse and the cause thereof, and stated that he (the plaintiff) wished him to come and examine the culvert. He also informed Nasmith that he had notified Thomas Howard, the reeve of Stephenson. Nasmith said

he would communicate with Howard, and did so on the 27th January, but that letter Mr. Howard did not produce on his examination for discovery.

Judgment.  
MacMahon, J.

Howard, Nasmith, and the plaintiff met on the 29th January at the culvert where the horse was injured, and examined it.

On the 14th February Mr. Nasmith wrote informing the plaintiff that the corporation of the township of Macaulay did not recognize his claim for the loss of the horse, as the corporation considered that the loss arose from the fault of the plaintiff's teamster. And on the 15th February Mr. Howard, on behalf of the township of Stephenson, wrote the plaintiff to the like effect.

By the Imperial Act 43 & 44 Vict. ch. 42 (the Employers' Liability Act), sec. 4, (sec. 9 of our Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, is the same in its terms) an action for the recovery under this Act of compensation for an injury shall not be maintainable unless "notice that injury has been sustained" is given within six weeks. And by sec. 7, of the Imperial Act (from which sec. 13 of our Act was copied) notice in respect of any injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date, and shall be served on the employer, and may be served by delivery or by post.

It was held in *Moyle v. Jenkins* (1881), 8 Q.B.D. 116, that the notice under this Act must be in writing. And in *Keen v. Millwall Dock Co.* (1882), 8 Q.B.D. 482, the plaintiff, a dock servant, was injured, and the same day gave verbal particulars of the injury and of its cause to a dock superintendent, who wrote it down and made a report of it to the defendant company. Within the six weeks the plaintiff's solicitor wrote the following letter to the secretary of the defendants:

"Sir,—I am instructed by George Keen, of 136, Rhodeswell Road, Limehouse, to apply to you for compen-

Judgment.

MacMahon, J.

sation for injury received at your dock, particulars of which have been already communicated to your superintendent."

No other notice was given within the six weeks.

The Court of Appeal held that the solicitor's letter did not refer to the report by the superintendent of the company in terms sufficient to incorporate its contents, and upheld the nonsuit entered at the trial.

One point strenuously urged on behalf of the respective plaintiffs in the cases of *Moyle v. Jenkins* and *Keen v. Millwall Dock Co.* was, that, as neither sec. 4 nor 7 of the Employers' Liability Act expressly provided that the notice of injury should be in writing, a written notice was not essential. The Courts, however, held otherwise. But that question cannot arise here, as the sections of the Municipal Act to which reference has already been made, are express that the notice shall be in writing.

What took place on the 27th January between the plaintiff and Mr. Nasmith, the reeve of Macaulay, was not, as far as that municipality is concerned, a waiver of the requirements of the Act, although Mr. Nasmith said he would, and did, write Mr. Howard, the reeve of Stephenson, and in consequence of such communication they met and examined the part of the highway where the horse was injured.

But for the amendment to the statute the case would have been governed by the case of *Leizert v. Township of Matilda*, 26 A.R. 1, and from what was stated by counsel during the argument it appears that all parties connected with the litigation were unaware of the amendment to the Municipal Act passed in 1899 (62 Vict. (2) ch. 26, sec. 39) until the time of the trial. So that, although the appeal must be dismissed, under the circumstances it should be without costs.

MEREDITH, C.J. :—

I agree.

E. B. B.

## LOVE V. LATIMER.

*Trade Name—Sale of Business—Right to Use for Limited Period—Right to Use After Expiry.*

The proprietor of a firm name, not being merely his own name, who has sold the business with which it was connected, and with it the right to use the firm name for a limited period, cannot, after the expiry of the time, prevent the user of such name when he himself does not carry on or intend to carry on business under it.

THIS was an action to restrain the use of a business trade-name under the circumstances set out in the judgment, tried at Toronto on the 1st and 2nd October, 1900, before STREET, J., without a jury.

Statement.

*Meek*, for the plaintiff.

*Heighington*, for the defendant.

The following authorities were referred to: *The Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. at p. 33; *Kerly's Law of Trade-marks and Trade-name*, 391, 417; *Levy v. Walker* (1878), 10 Ch. D. 436 at pp. 448, 449; *Walker v. Mottram* (1881), 19 Ch. D. 355; *Gage v. The Canada Publishing Co.* (1884), 6 O.R. 68, 11 A.R. 402 (1885), 11 S.C.R. 306; *Robinson v. Bogle* (1889), 18 O.R. 387; *Shipwright v. Clements* (1871), 19 W.R. 599; *Brown on Trade-marks* 2nd ed. sec. 91; *Cotton v. Gillard* (1875), 44 L.J. Ch. 90; *Ex parte Lawrence Brothers—Re Marler's Trade-mark* (1881), 44 L.T.N.S. 98; *Maughan v. Sharpe* (1864), 17 C.B.N.S. 443; *Johnson v. Helleley* (1864), 34 Beav. 63; *Robertson v. Quiddington* (1860), 28 Beav. 529, *Allan on Goodwill* pp. 19-21; *Webster v. Webster* (1791), 3 Swans. 490; *Trego v. Hunt*, [1896] A.C. 7.

October 5, 1900. STREET, J.:—

The only claim the plaintiff had to the name of "Neil C. Love & Co." was because the business carried on by his

Judgment.  
Street, J.

father under that name was bequeathed to him and because he carried on the business for some years after his father's death under that name. Then he sold the business and the goodwill to the defendant, and a paper of a very informal character was drawn up by the defendant in the following words: "I, Charles Love, do hereby agree to sell the stock of drugs and fixtures and goodwill and preparations and the (name of Neil C. Love & Co., for at least five years) now being carried on at 166 Yonge Street (to) W. Latimer for the sum of \$4,000, and that I, W. Latimer, do hereby deposit the sum of \$50 as binding the agreement, providing that the lease of the premises can be obtained at \$70, or less, for at least the term of five years." This was signed by the plaintiff and defendant.

The plaintiff does not dispute that the sale of the goodwill and everything but the right to use the name was absolute, but he disputes the defendant's right to use name after the expiration of the period of five years.

The meaning, if any, which the parties intended to attach to the use of the words "at least five years" in regard to the firm name is not apparent on the face of the document and no satisfactory explanation was afforded as to it by either the evidence or the argument.

The plaintiff ceased to carry on business when he sold out to the defendant, and entered the civil service, where he has ever since been employed, and where he intends remaining.

Since the action was begun the defendant has abandoned the use of the name of "Neil C. Love & Co.," and has also sold out the business, so that the case has been brought down to trial merely to determine who should pay the costs.

I may add that there was no evidence that at the end of five years the name "Neil C. Love & Co." was of any pecuniary value to any one.

The defendant was quite willing to discontinue it at the end of the five years but was requested by the plaintiff to continue to use it and he did so for two years longer

and until shortly after he was forbidden to use it by the plaintiff, whereupon he seems to have denied the plaintiff's right to stop him from further use of it, but to have in fact discontinued its use.

Whatever right the plaintiff might have had to restrain the defendant from using the name of "Neil C. Love & Co." as describing his business, had the plaintiff wished to begin again to carry on the business himself, I can find no authority for the position that he has any such right apart from any business at all. The name of a firm may, under certain circumstances, pass to its successors in the business as part of the goodwill, but the exclusive right to a firm name strictly as such (the name not being the actual name of the person claiming it) does not seem to be a right which can be enforced by a person who neither carries on nor intends to carry on a business under that firm name.

The underlying principle seems to be that a person has *prima facie* and apart from special legislation the right to carry on business under any name he pleases, and it is only when by doing so he misleads the public to the injury of someone else, or when some statute prevents his doing so, that he can be restrained from using the name he has chosen.

There is no contract by the defendant here not to use the name of "Neil C. Love & Co." after the five years, but it is possible, looking at the writing between the parties, that if after five years the plaintiff had desired to resume business under that name he might have restrained the defendant from using it to his detriment.

In my opinion the plaintiff had not when he commenced this action any right which he could enforce against the defendant, and the action must be dismissed with costs.

G. A. B.

Judgment.

Street, J.



## McHUGH V. GRAND TRUNK R. W. Co.

*Executors and Administrators—Fatal Accident Act—Death of Beneficiary  
—Survival of Action.*

An action under the Fatal Accident Act, R.S.O. 1897 ch. 166, by the personal representative of the deceased for the benefit of a beneficiary, survives on the death of the latter, and may be continued on representation being obtained to the estate of the beneficiary.

**Statement.** CASE stated for the judgment of the Court upon a point of law.

Patrick J. McHugh died on the 1st March, 1900, from injuries received while in the employment of the defendants as a brakesman. At the time of his death he was unmarried, his father was dead, and his mother, Mary McHugh, was the only person for whose benefit an action could be brought against the defendants. On the 28th March, 1900, this action was brought by the administrator of the estate of Patrick J. McHugh, for the benefit of Mary McHugh, under Lord Campbell's Act. The statement of claim was delivered on the 5th May, the statement of defence on the 23rd May, and issue joined on 25th May, 1900. Mary McHugh died on the last mentioned day. On the 16th July, 1900, a præcipe order of revivor was issued permitting this action to be continued by the plaintiff as administrator of the estate of Mary McHugh, as well as of that of Patrick McHugh.

The question to be determined was whether any cause of action survived to the plaintiff as administrator of the estate of Mary McHugh, or as administrator of the estate of Patrick J. McHugh.

The case was heard by FERGUSON, J., in the Weekly Court, on the 25th October, 1900.

*W. E. Middleton*, for the plaintiff. The right of action conferred by Lord Campbell's Act became completely vested in Mary McHugh, or in the administrator of Patrick McHugh, in trust for her, immediately upon the happening

of the accident, and the death of her son. Since the passing of the statute now R.S.O. 1897 ch. 129, sec. 10, at any rate, this cause of action and beneficial interest would pass to the personal representative of the deceased beneficiary: *Mason v. Town of Peterborough* (1893), 20 A.R. 683. The right of action conferred by the statute is based upon the pecuniary injury sustained by the beneficiary, and is therefore within the scope of that statute: see the cases collected in *Beven on Negligence*, 2nd ed., p. 210; *Leggott v. Great Northern R. W. Co.* (1876), 1 Q.B.D. 599; *Bradshaw v. Lancashire and Yorkshire R.W. Co.* (1875), L.R. 10 C.P. 189. The American cases shew that this right of action is assignable, and it follows that it must now pass to the administrator: *Tiffany on Death by Wrongful Act*, sec. 88.

*D. L. McCarthy*, for the defendants. But for the statute no action could be brought, the maxim "*actio personalis*," etc., protecting the defendants. The statute, however, steps in and permits an action to be brought by the administrator for the benefit of certain persons, it being distinctly stated that anything recovered shall *not* form any part of the deceased's estate, and the amount recovered is measured by the pecuniary value the deceased was to the person claiming under the statute. At the time of the deceased's death she had not recovered anything, she had merely a right to bring an action, *i.e.*, an "*actio*," for her benefit, and for her benefit only; it was not something that she could assign, as by so doing she would defeat the intention of the statute: see dicta of the Court of Appeal in *May v. Lane* (1894), 64 L.J. Q.B. 237, as to the right to assign a right to bring an action for unliquidated damages; see also *Tiffany on Death by Wrongful Act*, sec. 87. The rights are the same as if the action had been brought by the mother: *Railroad v. Bean* (1894), 94 Tenn. 388; *Loague v. Railroad* (1892), 91 Tenn. 458. If the sum recovered cannot go to the deceased's estate, how can it go to the estate of the beneficiary? The fact

## Argument.

that the measure of damages is the pecuniary value of the deceased to the beneficiary shews that it is intended for her only. Section 10 of R.S.O. ch. 129 does not apply, because the deceased Patrick McHugh could not have brought an action, he being killed instantly, and there was no injury to either his estate, or Mrs. McHugh's estate. The person sought to be benefited by the Act has ceased to exist; no one else can invoke the provisions of the Act in his aid; and once the Act becomes of no effect the maxim "*actio personalis*," etc., applies, and the action must necessarily abate.

November 6, 1900. FERGUSON, J.:—

Assuming that the plaintiff was entitled to recover in the action for the benefit of the late Mary McHugh, had she not died, then, according to the view taken in the case *Sibbald v. Grand Trunk R. W. Co.* (1890), 19 O.R. at pp. 167-8, the effect of her death was only to reduce the amount to be recovered. She was the only beneficiary. There was, upon the assumption aforesaid, some sum of money to which Mary McHugh died beneficially entitled to receive when recovered, and, after a search for authorities and a perusal of the judgment of Justice Comstock (concurrent in by the three other members of the Court of Appeals) in the case *Quin v. Moore* (1857), 15 N.Y. 432, I am of the opinion that this sum, when recovered, would constitute part of the estate of Mary McHugh, and would go to the administrator of that estate, whose hand would be the hand to receive it.

I think the action can be proceeded with notwithstanding the death of Mary McHugh, but that administration to her estate was necessary. I think this is not at all a case in which the rule "*actio personalis*," etc., applies. It seems to me a case, simply, of the death of a person beneficially entitled, on the assumption aforesaid, to receive a sum of money when recovered.

The question asked consists of two questions, and seems to me not to be skilfully framed. According to what I take to be the true meaning and intention, I am of the opinion that both questions should be answered in the affirmative, and such is my answer.

Judgment.  
Ferguson, J.

E. B. B.

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RE SAMUEL ROBINSON CLARKE.

*Solicitor—Annual Certificate—Practising Without—R.S.O. 1897, ch. 174, secs. 22, 23, 24.*

A solicitor who has not taken out his annual certificate cannot, without rendering himself liable to suspension, etc., under the provisions of sections 22, 23 and 24 of An Act Respecting Solicitors, R.S.O. 1897, ch. 174, practice as such, even in an isolated instance, and he is not relieved by the fact that he is interested in the subject matter of the litigation.

THIS was a motion to suspend a solicitor from practising under the circumstances set out in the judgment, and was argued in Court on the 30th October, 1900, before ROSE, J.

Statement.

*Walter Read*, appeared for the Law Society, and contended that as the solicitor had practised by applying for a mandamus in the High Court of Justice and issuing a writ in the County Court as solicitor for another party, he was liable to suspension until he had paid his annual fees and the penalty imposed by sec. 24 of R.S.O. 1897, ch. 174.

*S. R. Clarke*, the solicitor, appeared in person, and contended that as he had not been in active practise for some years, and as he had only acted as solicitor in one matter, and that in that he was really the plaintiff himself, as the other plaintiff, who was joined with him as plaintiff, only held the claim in his name as security for a debt for which it had been assigned by the solicitor, that he did

Argument.

not come under the provisions of R.S.O. 1897, ch. 174 as to suspension for practising, and cited *In re Horton* (1881), 8 Q.B.D. 434, and *Macdougall v. The Law Society of Upper Canada* (1890), 18 S.C.R. 203.

*Read, in reply.*

October 31, 1900. ROSE, J.:—

This is an application made under sections 22, 23 and 24 of An Act Respecting Solicitors, for an order to suspend the solicitor for a period of not less than three nor more than six months, and to continue the suspension until the fee for his certificate for the year 1900, together with the penalty of \$40, be paid, the charge being that the solicitor has practised in the High Court without the certificate required by the statute.

The cause shewn was that this was only one act and so not practising, the solicitor relying upon *In re Horton* (1881), 8 Q.B.D. 434; and secondly, that the solicitor was the substantial plaintiff in the action, the name of one Jackson being used for the solicitor's convenience.

I think neither ground is tenable. This case is clearly distinguishable from *In re Horton*. There what was complained of was attending upon a taxation of a bill of costs. On the wording of the statute then before the Court it was held that that one act did not come within the words "acts or practises" or "or carries on his business."

Here, however, the solicitor took proceedings as solicitor for one George Jackson to obtain an order of mandamus directed to His Honour Judge Morson, requiring him to commit the defendant W. J. Clark; and upon that motion failing, he carried an appeal in the plaintiff's name as his solicitor to the Divisional Court.

Not only were these motions made in the High Court, but a writ was issued in the County Court of the county of York at the suit of the solicitor and the same George Jackson against the defendants therein named, and on the

back of the writ is endorsed a statement that the writ was issued by the solicitor as solicitor for the plaintiffs.

Assume that a solicitor, acting as solicitor for a plaintiff, issued a writ and carried on proceedings to the Privy Council through all the Courts, making interlocutory applications, could it be said that he was not practising?

Nor does it seem to me to make anything in favour of the solicitor that he was interested in the subject-matter of the litigation either solely or jointly with his co-plaintiff. If that argument were to prevail, then there would be nothing to prevent a solicitor who had not taken out his certificate, and who had a large number of promissory notes, from endorsing these notes to various persons and issuing a writ on each note respectively in the name of a different plaintiff, as solicitor for such plaintiff, and carrying on proceedings in all the Courts in such form.

A fair test would be, could a layman issue a writ in such form as solicitor for another and carry on the proceedings as solicitor for such person simply because that he only was interested in the subject-matter of the suit? The question, of course, answers itself.

This case is clearly distinguishable from *Macdougall v. The Law Society of Upper Canada* (1890), 18 S.C.R. 203.

I think, therefore, that the solicitor has been guilty of practising in the High Court and in the County Court without a certificate, and is liable to have an order made as prayed. I am of the opinion, however, that as this is the only case of transgression shewn, and that, as far as the material shews, the solicitor has not been practising since the year 1891, it would not be unreasonable to accept the statement of the solicitor that he did not think that he was acting contrary to the requirements of the statute, and therefore that it is a case in which if the costs of this application are paid within, say, thirty days, no further order need issue. If, however, the costs of this application are not paid within thirty days, I may be applied to for a direction that the order may issue.

G. A. B.

Judgment.

Rose, J.

## MANN ET AL. V. GRAND TRUNK R. W. CO.

*Deed—Construction—Gravel—Subsequent Deposit.*

In 1856 the owner of land by deed conveyed to a railway company "the gravel situate and being on and comprised within a certain part" of the land, with the right of way for a railway track and the free and unobstructed use thereof, and covenanted for quiet possession, free from incumbrances, of the gravel and other the premises conveyed. Subsequently the company removed all the gravel which was on the land at the date of the deed:—

*Held*, that gravel deposited on the land after the date of the deed, owing to the action of the waters of a lake, did not pass by the conveyance.

**Statement.**

ACTION for the conversion of a quantity of gravel taken by the defendants from the lands of the plaintiffs, and for an injunction to restrain the defendants from entering on and removing gravel from these lands or in any way interfering with them. The facts appear in the judgment.

The action was tried before MEREDITH, C.J., without a jury, at Cayuga, on the 30th October, 1900.

*J. H. Moss* and *W. D. Swayze*, for the plaintiffs.

*Wallace Nesbitt*, Q.C., for the defendants.

November 22, 1900. MEREDITH, C.J.:—

The facts are not in dispute.

William C. Benson, a predecessor in title of the plaintiffs, on the 10th day of September, 1856, by deed of that date, conveyed to the Buffalo and Lake Huron Railway Company, the predecessors in title of the defendants, "the gravel situate and being on and comprised within a certain part" of lot number 4 in the 1st concession of the township of Moulton, described in the deed, "with the right of way for a railway track and the free and unobstructed use thereof for locomotives, trains, engines, and cars from the railway of the party of the second part (the company) to the said gravel hereby conveyed and from the said gravel to the

said railway . . . including, comprising, and comprehending in this conveyance all and singular all the gravel in the ridge through which the said track from the said railway to the gravel hereinbefore first mentioned as being conveyed, passed or shall or may pass; the extent and description of the gravel hereby conveyed, and the said right of way and other the privileges, easements, and appurtenances are particularly described, defined, and limited in the map or plan and description thereof drawn and indorsed on these presents;" and the deed contains a covenant on the part of the grantor for quiet possession, free from incumbrances, of the gravel and other the premises conveyed.

Judgment.  
Meredith, C.J.

The plan referred to in the deed shews only the boundaries of the parcel of land referred to in the deed.

All the gravel which was at the date of the conveyance on that part of the land described on the plan which was south of the Lake road was long since removed by the defendants, and that for the conversion of which the action is brought was deposited on that part of the land since the date of the conveyance, having been so deposited owing to the action of the waters of Lake Erie.

It was admitted that, if the gravel thus deposited since the making of the conveyance did not pass by it, the plaintiffs were entitled to recover, and the damages were by consent fixed at \$250.

I am of opinion that the gravel deposited on the land since the date of the conveyance did not pass by the conveyance. Apart from the easements granted, it is only the gravel situate and being on and comprised within the parcel of land described in the conveyance that is granted, and I am unable to understand upon what principle gravel then, *i.e.*, at the time of the conveyance, neither on nor comprised within the land, can be held to have passed.

I can see no difference between this grant of gravel and a grant in similar terms of stone or trees, and it would seem an extraordinary result that in case of stone,



**Judgment.**

Meredith, C.J.

that brought or deposited on the land, it might be half a century after all the stone which was upon it at the time of the conveyance had been removed, should pass to the grantee, or, in the case of trees, that, after every tree which was growing upon the land when the conveyance was made had been removed and a new forest had subsequently grown up, the new forest should pass.

Such a conveyance is not like a grant in perpetuity of the right to take gravel or stone or trees from the land of the grantor. Assuming that such a grant would confer a right as extensive as that which the defendants claim, there is a wide difference between a grant of the gravel or the stone or the trees on the grantor's land with the right to enter thereon and remove the thing granted, and such a grant as I have referred to, which, in its terms and very nature, would appear to comprehend the gravel or the stone or the trees which at any time thereafter might be found on the land.

In *Stukeley v. Butler* (1815), Hobart, at p. 173, that Lord Chief Justice treats a grant by the tenant in fee simple of trees as absolutely passing them from the grantor and his heirs and vesting them in the grantee as chattels, divided from the freehold, and that is well settled law.

I apprehend from the stress laid by Lord Romilly in *Gordon v. Woodford* (1859), 27 Beav. at p. 607, on the words appearing in a grant of timber "shall hereafter grow and be upon the said lands," that he treated it as clear that without those words the grant would have passed only trees existing at the time the grant was made.

And *Glover v. Andrew* (circa 1568), Anderson's Reports 7, as I read it, is an express decision in the case of trees in support of the view I have expressed.

There would have been, perhaps, more difficulty in the case had it appeared that gravel was continually being formed in or added to the land in such a way that it was impossible to separate the added part from that which was in or on the land at the time of the grant, but in this case

no such difficulty of separation exists as to the gravel in question, all of it having been deposited on the land since the date of the grant.

The plaintiffs asked for a declaration as to the rights acquired by the railway company by the grant, and for an injunction restraining the defendants from removing or interfering with any gravel deposited on the land after the date of the grant, and that they are, I think, entitled to, limiting the declaration of right and the injunction to the gravel on that part of the land south of the Lake road. The injunction will, however, be suspended for six months to enable the defendants to take such proceedings as it may be open to them to take to acquire under the Railway Act such rights in respect of the plaintiffs' lands and the gravel thereon as they may be entitled to acquire by the expropriation proceedings provided by that Act.

The defendants must pay the costs of the action.

E. B. B.

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# RE WILLIAM LAMB MANUFACTURING CO. OF OTTAWA.

*Company—Voluntary Assignment by—Petition for Winding-up Order—Discretion.*

Where the insolvency of the company is admitted, the Court has no discretion under sec. 9 of the Winding-up Act, R.S.C. ch. 129, to refuse to grant a winding-up order on the petition of a creditor who has a substantial interest in the estate, although the company has made a voluntary assignment for the benefit of its creditors, and most of them are willing that the winding-up should be under such assignment.  
*Wakefield Rattan Co. v. Hamilton Whip Co. (1893), 24 O.R. 107, not followed.*

A PETITION under the Winding-up Act, R.S.C. ch. 129, for an order or orders for the winding-up of the company, which was incorporated in 1899 under the Ontario Companies Act. Statement.

The petitioners, D. Gunn Brothers and Company, recovered two judgments against the company for about

Statement.

\$500 in all in October, 1900, and placed writs of execution in the sheriff's hands, which at the time of filing the petition, on the 31st October, 1900, remained unsatisfied.

The petition stated that the company had made an assignment of their estate to one Mutchmor; that the authorized capital was \$40,000, of which \$16,600 had been subscribed by stockholders; and that a part of the subscribed stock had not been paid up.

The affidavit filed in support of the petition stated that the company were indebted to the Ontario Bank in about \$14,000, and to trade creditors in about \$12,000; that the company were in business for only about ten months, and that they were burned out on the 8th September, 1900; that the loss, which was almost a total one, occasioned by the fire, had been appraised at about \$14,000; that over and above the insurance moneys, about \$10,000, the company had no assets available to pay creditors; that the deponent believed it would be advantageous and in the interest of creditors to have the company wound up under the direction of the Court.

It also appeared that the assignment for the benefit of creditors was made to Mutchmor on the 20th October, 1900.

The petition for the winding-up order was served on the 31st October, 1900, returnable on the 7th November, and was then enlarged.

The company and Mutchmor opposed the petition and shewed by affidavits that the assets of the company consisted of insurance moneys, salvage, horses, rolling stock, and book accounts; that there was no unpaid capital stock; that pending the enlargement of the petition, on the 8th November, a meeting of creditors was held under the assignment, when fifteen creditors, representing liabilities amounting to \$20,071.43, out of a total liability of \$22,058.89, were present or represented, the petitioning creditors, whose claim amounted to \$496, being represented by proxy which authorized their representative to

act for them generally at all meetings in reference to their claim, and in all respects to represent them as if they were personally present; that at this meeting resolutions were passed unanimously confirming Mutchmor as assignee, appointing inspectors, one of whom was the representative of the petitioning creditors, and providing that the estate should be wound up by the assignee under the assignment and under the direction of the inspectors; that a meeting of the inspectors were subsequently held, at which the representative of the petitioning creditors attended and in which he took part.

Statement.

The petitioners in reply denied some of the statements made by the respondents, and alleged that their representative at the meeting of creditors had no instructions to vote for the winding-up of the estate by the assignee under the assignment.

The petition was heard by MEREDITH, C.J., in Chambers, on the 23rd November, 1900.

*Gideon Grant*, for the petitioners.

*George Bell*, for the company and the assignee, contended that the making or refusing of the order was discretionary under sec. 9\* of the Winding-up Act, and that, in the exercise of discretion, the order ought to be refused, citing *Wakefield Rattan Co. v. Hamilton Whip Co.* (1893), 24 O.R. 107.

MEREDITH, C.J. (at the close of the argument):—

There is no doubt that the language of the learned Chancellor in the *Hamilton Whip Company* case lends support to the argument of Mr. Bell that the Court has a discretion on an application such as this wide enough to refuse a winding-up order, though the estate is admitted

\*9. The Court may make the order applied for, may dismiss the petition with or without costs, may adjourn the hearing conditionally or unconditionally, or may make any interim or other order that it deems just.

Judgment.

Meredith, C.J.

to be insolvent, and the creditor has a substantial claim against it. With very great respect, I do not think that there is any such discretion, or that, if there be such a discretion, it would be a proper exercise of the discretion to deny to the creditor in such a case as this the remedy which the Legislature, I think, intended that he should have. I think that the discretionary power was given for the purpose of dealing with cases where the creditor had a claim for a sum that would not justify such proceedings as these, where the embarrassment of the company was temporary, and the like, and it was, therefore, not expedient that it should be forced into liquidation. But I do not think the Legislature ever contemplated that, where it was conceded that the estate was insolvent and where there had been an assignment made for the benefit of creditors, the Court should have a discretion to refuse to grant the order upon an application of a creditor having a substantial claim upon the estate.

It would have been idle to provide that the making of such an assignment should be a ground for winding-up if Mr. Bell is right in saying that a discretion ought to be exercised in favour of refusing the order so as to permit the estate to be wound up under the assignment.

I think that, in the exercise of my discretion, if I have a discretion, I should make the order, and I, therefore, make the order for the winding-up; Mr. Mutchmor will be appointed the *interim* liquidator; and it will be referred to the local Master at Ottawa to appoint a permanent liquidator, and I think, unless substantial grounds are shewn for departing from the course, that Mr. Mutchmor should be appointed the permanent liquidator. No doubt in dealing with that the Master will or ought to be affected a good deal by the wishes of the body of creditors. The usual orders will issue for the winding-up and for delegating to the Master the powers which the Court has authority to delegate to him for the purpose of the winding-up of the estate.

E. B. B.

## CHALLONER

## V.

## THE CORPORATION OF THE TOWNSHIP OF LOBO ET AL.

*Municipal Corporation — Drainage By-law — Petition for—Qualification of Petitioners — “Last revised Assessment Roll” — “Exclusive of farmers’ sons not actual owners”—Meaning of—Interest in Land—Invalid By-law—Damages.*

The assessment roll last revised previous to the passing of a drainage by-law is the one to be looked at for the purpose of ascertaining whether the petition for the work was sufficiently signed to authorize the passing of the by-law.

The words “exclusive of farmers’ sons not actual owners” in sub-sec. 1 of sec. 3. R.S.O. 1897, ch. 226, do not refer to farmers’ sons who are not actual owners in fact, but to farmers’ sons so shewn by the last revised assessment roll.

An arrangement between a farmer and his sons by which he promised to convey the farm to them, he retaining a life interest, is sufficient to give them an interest in the land of a freehold nature, entitling them to be assessed as joint owners, and so assessed, they are not “farmers’ sons not actual owners.”

The by-law in question in this action was declared invalid, the petition therefor not having been properly signed within the meaning of sec. 3, but not having been quashed, the plaintiff was held not entitled to damages for work done under it.

*Connor v. Middagh and Hüll v. Middagh* (1889), 16 A.R. 356, and *McCulloch v. Township of Caledonia* (1898), 25 A.R. 417, followed.

THIS was an action, commenced on the 21st of December, 1899, for an injunction to restrain the defendants from constructing a drain, under a by-law passed pursuant to the provisions of The Municipal Drainage Act, R.S.O. 1897, c. 226, upon the ground that the petition therefor was not signed by a sufficient number of properly qualified property owners, and for damages.

Statement.

The action was tried at London on the 24th of March, 1900, before MEREDITH, C.J., without a jury.

It appeared that the petition was presented on the 10th April, 1899, at which date the last revised assessment roll was that of 1898, and a majority of the owners of land to be benefited as appeared by that roll had signed the petition.

**Statement.**

The engineer made his report on the 2nd of August, and it was adopted by the council on the 21st of August, and the by-law was finally passed on the 9th October, 1899; the assessment roll for the year 1899 having been in the meantime finally revised some time previous to the 1st of August.

On the roll for 1899 there appeared the names of 31 owners of land to be benefited of whom 15 had signed the petition.

The defendants contended in support of the by-law that a majority had signed the petition, because out of the remaining 16 landowners at least five were not entitled to be taken into consideration they being "farmers' sons not actually owners," viz., Alfred J. Campbell, George A. Craven, John R. Craven, Malcolm A. McKellar and Archibald D. McKellar.

The evidence shewed that Alfred J. Campbell was a farmer's son living with his father and was not an owner, but was assessed as a freeholder jointly with his father; that Malcolm A. McKellar and Archibald D. McKellar were living with their father on a village lot in Komoka; their father also owned two acres of land in the drainage area cultivated as a vegetable garden; the father and sons were assessed as joint owners of the village lot and the two acres, but the sons were not owners in fact; and that George A. Craven and John R. Craven were farmer's sons living with their father on his farm, were assessed as owners jointly with their father but were not owners in fact; the father, it was alleged, had promised to give them the farm "when he was done with it" if they would stay with him, and was willing and had some time previously offered to convey the farm to the sons, retaining a life lease in himself.

*T. G. Meredith*, for the plaintiff, contended that there was no jurisdiction to construct the drain unless the petition was properly and sufficiently signed, and that the

last existing revised assessment roll, viz., that of the year 1899, was the one which governed and referred to secs. 17 and 18 of the Municipal Drainage Act, R.S.O. 1897, c. 226.

*Macbeth*, for the defendant corporation, contended that farmers' sons might be jointly assessed with their father as if owners with him, and that the words in parenthesis in sec. 3 of the Drainage Act excluded them, when so assessed; that the roll of 1898 was the governing one; that the merits were with the defendant corporation; and that no damages could be recovered as the by-law had not been quashed; he referred to *Rose v. Township of West Wawanosh* (1890), 19 O.R. 294; *South Dorchester and Dereham v. Malahide* (1895), 1 Clark & Scully's Drainage Cases, 275; *McCulloch v. Township of Caledonia* (1898), 25 A.R. at p. 427.

*Meredith*, in reply, referred to *York v. Township of Osgoode* (1892), 24 O.R. 12; (1894), 21 A.R. at p. 171; *Re Robertson and the Municipal Council of the Township of North Easthope* (1889), 16 A.R. 214; *Alexander v. The Corporation of the Township of Howard* (1886), 14 O.R. 22.

*A. Stuart*, appeared for the defendant Oliver, who had entered into a contract with the township to dig the drain.

June 18, 1900. MEREDITH, C.J.:—

The main question in dispute is as to the sufficiency of the petition to support the by-law under which the drainage work, the doing of which is sought to be restrained, was undertaken; it being conceded by the defendants that unless the petition was signed by the required proportion of the property owners interested, the by-law cannot be sustained.

The first question to be determined is what assessment roll, that of 1898 or that of 1899, is to be looked at for the purpose of ascertaining whether the petition was sufficiently signed to authorize the passing of the by-law.



Judgment.

Meredith, C.J.

The petition to afford a foundation for action by the municipality must be by "the majority in number of the "resident and non-resident persons (exclusive of farmers' "sons not actual owners) as shewn by the last revised "assessment roll to be the owners of the lands to be bene- "fited, etc.," : R.S.O. 1897, c. 226, s. 3.

The petition in question was presented to the council on the 10th April, 1899, and the then last revised assessment roll of the municipality was that of 1898 and on that day the municipal clerk was by resolution of the council "instructed to ask the township engineer to make plans, "specifications and detailed estimates of the drain to be "constructed and to report to the council."

The engineer handed his report to the clerk on the 31st July, 1899, and thereupon the clerk gave to the property owners affected by it the notice required by section 16, naming the 14th August following, as the day on which the council would meet to read and consider the report, in accordance with the provisions of section 17.

The meeting was held on the 14th August, 1899 ; at it a number of ratepayers were present and an opportunity was given to any one who had signed the petition to withdraw from it, and to any one who had not signed an opportunity to sign it.

Owing to some incompleteness in the assessment, the meeting was adjourned for a week to procure the engineer to correct it, which was done, and on the 21st August, 1899, the report as amended was adopted and the clerk was instructed to prepare the necessary by-law.

The by-law was provisionally adopted on the 4th September, 1899, and was finally passed on the 9th October following. I omit the proceedings between these dates, as nothing turns upon them.

The assessment roll of the municipality for 1899 was finally revised before the 1st August of that year, but on what day was not made to appear in evidence, and the exact date is not material.

The by-law, the form of which is provided for by section 20, which, as I have said, was provisionally adopted on the 4th September, 1899, and finally passed on the 9th October following, recites the petition and that it was by "a majority . . . as shewn by the last revised assessment roll"; so that the roll of 1899 is on the face of the by-law treated as the governing one.

Judgment.  
Meredith, C.J.

The meeting held in accordance with the provisions of section 17 was, as has been seen, held after the roll of 1899 had been revised, and by section 18 in order to justify action by the council upon a petition it must appear at the close of the meeting of the ratepayers that the petition contains the "names of the majority of the persons shewn as aforesaid"; that is to say, as I read the section, by the last revised assessment roll to be the owners benefited within the area described.

Looking at the machinery provided by the Act it seems to me that what is contemplated is that at the time action is taken by the council by passing the by-law, the council must have before it a petition for the work signed by the necessary majority according to the then last revised assessment roll, and accordingly provision is made for the withdrawal from and the addition to the petition of names of property owners affected, and if the result be that after such withdrawals and additions the petition has upon it the names of a majority of these owners, as shewn by the then last revised assessment roll, the council may proceed to pass the necessary by-law, but if such a majority is not shewn the proceedings end with the meeting under section 17.

Difficulties in the way of adopting this construction of the Act may be suggested, but it is to be observed that the petition is the basis for the taxation of the property owners, and for interfering with their lands for the purpose of the contemplated work at the will of the majority and against the wishes of the minority, and if in such a case as this, the roll, which was the last revised assessment

Judgment.

Meredith, C.J.

roll at the time the petition was presented must be taken to be the governing one, it might happen, as indeed in this case it would happen, that the work would be forced upon a majority of the owners, treating all who did not sign the petition as opposed to its being undertaken by a majority made up in part of persons who, when action was taken, had ceased to have any interest in the matter.

No inconvenience results from the adoption of this construction of the Act, because the meeting provided for affords the means of ascertaining the wishes of the property owners and the persons assessed as owners not being necessarily the actual owners but being the only persons recognized in ascertaining whether the majority of the owners has petitioned, it would appear to me that the latest ascertainment of these owners is the one which the Legislature must have intended should be resorted to.

I come, therefore, to the conclusion that the roll of 1899 is the governing one.

The next question is as to the meaning of the words in parenthesis in section 3, "exclusive of farmers' sons not actual owners." Does this mean exclusive of farmers' sons who are not actual owners, in fact, or as shewn by the last revised assessment roll?

The latter is, in my opinion, the meaning. It is, I think, in accordance with the grammatical construction of the section, and to adopt the opposite view would require that in determining as to whether a petition has been sufficiently signed, the council should enter into the often difficult question as to ownership, and for such an enquiry no adequate machinery and indeed no machinery at all, is provided by the Act. The Legislature, in my opinion, did not intend that any such enquiry should be made, but did intend that the roll and it only should be looked at for the purpose of ascertaining who were to be counted as owners in determining whether the petition was sufficiently signed. There would be no certainty if this be not so, for if it were otherwise, though the council might determine in one

way and proceed to pass its by-law on that basis, it would always be open to any one to re-open the question so determined and there would be no finality or security in proceeding with the work under the provisions of the Act.

Judgment.  
Meredith, C.J.

By sec. 13, sub-sec. 4, of the Assessment Act (R.S.O. 1897, ch. 224) the assessor is required to set down in column 4 of his roll where a person assessed is within the meaning of the Municipal Act "a farmers' son" opposite to such person's name the letters "F. S." So that provision is made for it appearing by the roll itself that a farmer's son electing to be assessed as joint owner is not an actual owner but entered as such because of his election as a farmer's son to be so assessed under section 14.

But if the other construction be the correct one, I am of opinion that John R. Craven and George F. Craven are not "farmers' sons not actual owners." They are assessed as joint owners with their father, George Craven. They assume to be and were assessed as joint owners with their father and were not entered in the assessment roll as joint owners under section 14 of the Assessment Act. The arrangement between them and their father gave them, in my opinion, an interest in the land of a freehold nature entitling them to be assessed as they were assessed. I do not understand that the exception in question has any application to such a case, even assuming that they could not properly claim to be joint owners in fact, but it applies, in my opinion, only where a farmer's son has claimed the right under section 14 to be assessed as a joint owner by reason only of his being a farmer's son.

It was practically conceded that Malcolm A. McKellar and Archibald D. McKellar were not farmer's sons as clearly they were not; the property in respect of which they were assessed not being a farm within the meaning of sec. 86, sub-sec. 2 of the Municipal Act, R.S.O. 1897, ch. 22.

It follows from these conclusions that a majority within the meaning of section 3 did not petition for the drainage

Judgment.  
Meredith, C.J.

work in question, it not being open to question that if the two Cravens (the sons) and the two McKellars are to be counted the petition was insufficiently signed.

The by-law is, therefore, in my opinion, invalid, and it must be so declared, and the defendants be enjoined from continuing or constructing the work through the plaintiff's lands.

The plaintiff claimed damages for the loss sustained by him from the cutting of timber on his lands on the line of the proposed drain through them, but the by-law not having been quashed I am bound by the construction placed upon section 468 of the Municipal Act by the Court of Appeal for Ontario to hold that the action is not in that respect maintainable: *Hill v. Middagh* and *Connor v. Middagh* (1889), 16 A.R. 356; *McCulloch v. Township of Caledonia* (1898), 25 A.R. 417.

As to costs, I think the plaintiff is entitled to the costs of the action as against both defendants. The defendant Oliver made common cause with his co-defendant in endeavouring to sustain the by-law, and I see no reason why he should be absolved from the usual consequence as to costs of an unsuccessful defence, though as between him and his co-defendant the latter ought, no doubt, to pay them.

G. A. B.

WILLIAMS V. THE MUNICIPAL CORPORATION OF THE TOWN  
OF CORNWALL.

*Statutes—Words—“Porch or Projection Attached to Any Dwelling”—Verandah—47 Vict. ch. 50 (O.)—R.S.O. 1897, ch. 223, sec. 2, sub-secs. 8, 448.*

When an Act of Parliament begins with words which describe things of an inferior degree and concludes with general words, the latter shall not be extended to anything of a higher degree.

A statute confirming a survey of a town provided that houses built before a named date need not be removed though encroaching upon streets as ascertained by such survey, but that this “shall not apply to any fence, steps, platform, sign, porch or projection attached to any such dwelling house” :—

*Held*, that a verandah of wood, resting on stone pillars, having its own roof, and firmly attached to such a house was an integral part of the house, and not a porch or projection attached to it, and need not be removed under the Act.

*Held*, also, that the position of the house and verandah did not debar the owner from applying for compensation under the Municipal Act for damage sustained, within sec. 448 of that Act, by lowering the grade of the street in front.

THIS was a special case, involving the interpretation of the statute, 47 Vict. ch. 50 (O.), confirming a survey of the town of Cornwall.

Statement.

The facts are stated in the judgment.

The case was argued on October 9th, 1900, before STREET, J.

*D. B. Maclellan*, Q.C., for the plaintiff.

*Leitch*, Q.C., for the defendants.

October 10th, 1900. STREET, J.:—

Special case stated by the judge of the County Court of the united counties of Stormont, Dundas, and Glengarry, pursuant to sec. 41 of R.S.O. 1897, ch. 62, in the course of an arbitration in progress before him as sole arbitrator under R.S.O. 1897, ch. 223, sec. 448.

Henry Williams, the applicant, owns a lot in Third Street, in the town of Cornwall, upon which a dwelling

Judgment.

Street, J.

house with a verandah attached to it was built prior to January 1st, 1883.

Under the survey of this part of the town of Cornwall, which was confirmed by 47 Vict. ch. 50 (O.), it was ascertained that this dwelling house encroached four feet upon the street and that the verandah encroached three feet six inches further upon the street, so that the southerly edge of the verandah was seven feet six inches over the line of, and upon, the street. The building is of brick; the verandah was across the whole front of the house and partially around the east side of it; it is made of wood, rests on stone pillars, has its own roof and is firmly attached to the house.

In the course of the duty of the council of the corporation of the town of Cornwall to keep the highways in proper repair, they have lowered the grade of Third Street, in front of the house in question, to an extent which, it is said, interferes with the owner's access to it and injuriously affects the value of it. The pending arbitration is the result of a claim for damages made by the owner against the corporation, and a large quantity of evidence has been taken. The learned arbitrator has stated the substantial facts of the case with sufficient detail, I think, to enable me to answer the questions submitted, but desires that counsel may refer to the evidence in order to supplement the facts he has stated. This might have thrown a good deal of difficulty in the way of a court endeavouring to deal with the matter, for it is questions of law not questions of fact which are to be submitted according to the statute. The facts, however, material for the determination of the questions submitted were not disputed upon the argument.

The first question is "whether the position of "Williams' dwelling house and verandah on Third Street "form a bar in any way to the allowance to him of compensation for the injury so caused."

Judgment.  
Street, J.

The statute, 47 Vict. ch. 50, which confirms the survey, contains the following provision immediately following the paragraph which declares the survey to lay down correctly the lines of the streets as originally laid out: " Provided that where any dwelling house or shop . . . had been before January 1st, 1883, partly built upon any street as ascertained by said survey it shall not be incumbent upon the owner or occupant of such dwelling house, shop, or building, to remove the same off such street until the rebuilding of such dwelling house, shop, or building, or the repairing thereof to the extent of 50 per cent. of the then cash value thereof; but this proviso shall not apply to any fence, steps, platform, sign, porch, or projection attached to any such dwelling house or shop."

The effect of this proviso is not to vest in the owner any portion of the street, but only to give him the right to keep his house upon it until it is destroyed or voluntarily removed by him. To that extent it legalizes an encroachment which would otherwise be an indictable nuisance.

The right to maintain the house in its present position is clearly an interest in land, and therefore comes within the meaning of the word "lands" as used in sec. 448 of R.S.O. ch. 223, according to the interpretation placed upon that word by sub-sec. (8) of the second section of the same Act.

The first question submitted should therefore be answered in the negative, but in arriving at the amount of compensation to be allowed (if any) the learned arbitrator will not of course fail to consider the nature and uncertain duration of the interest of the claimant in the particular portion of the property which is over the line of the street.

The second question is "whether the verandah comes under the proviso in sec. 1 of 47 Vict. ch. 50 (O.), or is an obstruction on the street which should be removed, and if it is an obstruction does that fact deprive the arbitrator of power to award compensation."



Judgment.  
Street, J.

Upon the facts, as I have stated them with the assistance of counsel upon the argument, I think the arbitrator should hold the verandah to be an integral part of the dwelling house and not a porch or projection attached to it. It is a much more important structure than any of those enumerated in the statute, and I think it is a case for applying the rule of construction that where an Act of Parliament begins with words which describe things of an inferior degree and concludes with general words the general words shall not be extended to anything of a higher degree: *Casher v. Holmes* (1831), 2 B. & Ad. 592. The second branch of the question is answered by the answer to the first question.

A. H. F. L.

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### CONLEY V. THE CANADIAN PACIFIC R.W. Co.

*Carriers—Railways—Consignment of Goods—"Order"—Production of Shipping Bills—Contributory Negligence.*

The plaintiff knowing that the defendants sometimes delivered goods without production of the shipping bills where not consigned "to order," consigned certain goods to the "I. C. Company," not yet incorporated, and the defendants delivered them to an individual carrying on business in that name and at the ostensible office of the company, without production of the bill:—

*Held*, that the defendants were not liable for misdelivery.

There is no law in this Province requiring carriers to take up shipping bills before the delivery of goods.

Statement.

THIS was an action for damages against the defendants for misdelivery of certain goods shipped by the plaintiffs by the defendants' railway under the circumstances mentioned in the judgment.

The action was tried on October 9th, 1900, at the Essex Autumn Assizes before MEREDITH, J., without a jury.

*Davis*, for the plaintiffs.

*Aylesworth, Q.C.*, and *J. S. Denison*, for the defendants.

Argument.

The following cases were cited: *Close v. Beatty* (1878), 28 C.P. 470; *Lindsay v. Cundy* (1877-8), 2 Q.B.D. 96, 3 App. Cas. 459; *Duff v. Budd* (1822), 3 B. & B. 177; *Stephenson v. Hart* (1828), 4 Bing. 476; *McKean v. McIvor* (1870), L.R. 6 Exch. 36; *Heugh v. London & North Western R.W. Co.* (1870), L.R. 5 Ex. 51.

November 13th, 1900. MEREDITH, J.:—

The plaintiffs' story, as told by Mr. Conley, the only witness in their behalf, is a somewhat extraordinary one, but one to which, having regard especially to the demeanour of the witness in giving his testimony, I give credence generally.

It is this:—

That he, acting for the plaintiffs, entered into a contract with persons about to form an incorporated company, under the name of "The International Chemical Company, Toronto," for the sale to that company, when incorporated, of the goods in question; that in the meantime the property in the goods was to remain in the plaintiffs; but the goods were at once to be shipped from Windsor where the transaction took place, to Toronto, notwithstanding, consigned to the proposed company; and that he was aware that the defendants' course of business was never to deliver goods consigned "to order" without the production and endorsement of the shipping bill, but that when not consigned "to order" they did sometimes deliver the goods without the production of the shipping bill; that in these circumstances he shipped the goods by way of the defendants' railroad, consigned to "International Chemical Co.," and not to their or the plaintiffs' order, and without giving the defendants any knowledge of the facts or dealing with them otherwise than as if it were an ordinary case of shipment by seller to buyer: see *Forbes v. Boston & Lowell Railroad Co.* (1882), 133 Mass. 154.

Judgment.

Meredith, J.

The persons with whom the plaintiffs had entered into this agreement were, or one of them was, in Toronto, and carrying on business in the name of "The International Chemical Company, Toronto," and the goods were delivered by the defendants (after enquiries made by one of such persons respecting the shipment and a request by him for immediate delivery after arrival) at the ostensible office of the company in Toronto, in the usual course of the carrier's business: see *Samuel v. Cheney* (1883), 135 Mass. 278.

Under these circumstances it was so obvious that the plaintiffs had themselves most to blame for such delivery, that the witness made no claim to the contrary, or to support the plaintiffs' claim, except upon the fact that the shipping bills were retained by him. So that the case turns upon the question whether the defendants are liable by reason of their having delivered the goods without first requiring the production of the shipping bills.

With or without the shipping bills, the delivery would not have been to the intended purchasers; there never could have been any delivery to them, for the company was never incorporated. Had the bills been produced and delivered to the defendants, it could yet be said, as truly as it is now, that the delivery was not to the intended consignees.

Whatever risks the defendants may have run by reason of possible transfers of the shipping bills, I am not aware that they were bound, as regards the parties to or named in the bill, to require the production of the bills before the delivery of the goods, though I cannot help thinking that, ordinarily, it might be a commendable course of business.

Production of the bill before delivery of the goods seems to be a statutable requirement of some States, but I am not aware of any enactment in force here of that nature, or having that effect.

And so it remains that the plaintiffs have themselves really to blame for that which they now allege was a conversion of their goods.

Judgment.  
Meredith, J.

They shipped the goods to "The International Chemical Company," knowing that there was really no such company in existence; they procured from the defendants a contract to carry the goods to Toronto and to deliver them there to that company, with all reasonable despatch, though they did not intend them to deliver the goods unless, and until, the proposed company should be incorporated; they knew that, in the ordinary course of business, the goods, shipped as they were, might be delivered without the production of the shipping bills; they knew that if they consigned the goods to the order of themselves, or probably of the consignees, they would not be delivered without the production and endorsement of the bills, yet they did not take the bills in that form, or ship in that way; and they dealt with the defendants as common carriers only, though intending to use them as warehouse keepers for an indefinite length of time, withholding from them the true state of the facts.

There being no law here requiring carriers to take up their shipping bills before delivery of the goods, and the plaintiffs not being in a position to say that the goods were not delivered to the consignees to whom they were addressed, a statement of the facts is tantamount to a statement that the plaintiffs cannot recover in this action.

As to the other ground of defence, based upon the plaintiffs' conduct subsequent to the delivery of the goods, I add nothing to what was said at the trial.

The plaintiffs' action is based upon a wrongful and negligent act, but they may, if they think it will help them, amend so as to claim also upon the contract; though it is probable that this view of the case has been considered and intentionally abandoned by them, for it is difficult to see how they can recover upon the contract when they are obliged to say that it was not

**Judgment.**

Meredith, J.

what they intended, that they intended the defendants to do something quite different from that which they procured them to contract to do; and if the action stand as one of trover, or one founded upon negligence, the plaintiffs cannot recover, for they have but themselves to blame, or at least themselves to blame most, for their loss.

The action must be dismissed with costs.

A. H. F. L.

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IN RE GEDDES AND GARDE.*Landlord and Tenant—Renewable Lease—Construction of Renewal Clause—Increased Rent.*

A renewable lease provided that renewals should be at such "increased" rent as should be determined by arbitrators "payable in like manner and under and subject to the like covenants, provisions and agreements as are contained in these presents." The lease further provided for the payment of the yearly rent as follows: "For the first ten years of the said term \$80 per annum; for the remaining eleven years \$100 per annum":—

*Held*, that the proper method of increasing the rent on renewal was by adding to the rent of \$80 per annum for the first ten years, and to the rent of \$100 per annum for the remaining eleven years of the renewal term.

*Held*, also, that the condition as to the rent for the new term being an increased rent, might be satisfied by making a merely nominal addition, there being no increase in the rental value of the premises.

**Statement.**

SPECIAL case stated under the Arbitration Act in reference to the construction of certain clauses in a renewable lease, which are set out in the judgment.

The case was argued on September 20th, 1900, before ROSE, J.

*Riddell, Q.C., and J. Macgregor* for the lessee.  
*Gamble* for the landlord.

November 2nd, 1900. ROSE, J.:—

This was a special case stated under the provisions of R.S.O. 1897, ch. 62, sec. 9, being The Arbitration Act.

I feel clear that the arbitrators are bound to award an increased rent.

Judgment.

Rose, J.

The clause in the lease providing for renewal states that the demise is to be "at such *increased* rent as may be determined upon as hereinafter mentioned, payable in like manner and under and subject to the like covenants, provisions and agreements as are contained in these presents, including this covenant for renewal, such rent to be determined by three indifferent or disinterested persons as arbitrators," and in a following proviso we find the words "who shall make an award touching such *increased* rent."

I therefore answer the first question in the affirmative.

The lease provided for payment of "the yearly rent as follows: For the first ten years of the said term eighty dollars per annum; for the remaining eleven years one hundred dollars per annum, all of said payments to be made half-yearly on the first day of January and July in each year."

It is admitted by the case that the present rental value is not greater than the rent payable annually during the last eleven years of the term granted by the lease, and on the argument, if I am not mistaken, it was admitted that the present rental value was not equal to the rent payable annually during the first ten years, and it was apparent that any increase must be nominal. The case does not admit that the present rental value is not equal to eighty dollars per annum, and it may be that if the arbitrators think best to increase the rent as I shall hereafter suggest, the landlord may desire to offer evidence as to the rental value. With that, however, I have nothing to do.

Three ways have been suggested by which the rent may be increased: (1) Adding together the annual payments for the twenty-one years, and making a nominal addition to that sum; (2) Adding to the sum payable

Judgment.

Rose, J.

during the last year of the term ; (3) Adding to each payment during the twenty-one years.

I am of opinion that the last course would satisfy the provision for renewal. If the lease had provided that the term should be renewed at the same rent as was reserved by the lease payable in like manner and under and subject to the like covenants, provisions and agreements as are contained in the lease, it seems to me that that language would be literally met by having a new lease drawn providing for the payment of rent exactly as is provided for by the lease in question, namely, eighty dollars a year for the first ten years, and one hundred dollars a year for the remaining eleven years ; and so it seems to me that if each annual payment of rent is increased and the new lease is drawn providing for the payment during the first ten years of the new term at, say, eighty dollars and one cent per annum, and for the remaining eleven years at one hundred dollars and one cent per annum, the provision of the lease will be complied with, *i.e.*, the new lease will provide for an increased rent in like manner and under and subject to like covenants, provisions and agreements as are contained in the lease under consideration.

The question is, of course, not without difficulty, otherwise the arbitrators would not have found it necessary to have stated a case. It was pressed upon me with much force that "increased rent" meant an increase over the last payment. Assuming that the rent reserved by the lease had been a decreasing instead of an increasing rent, so that the first ten years had been at the rate of one hundred dollars per annum, and the remaining eleven years at the rate of eighty dollars per annum, would the lessor have felt that the increase should be an increase solely over the rent payable in the last year?

If the arbitrators adopt the view which I suggest, while some may doubt the conclusion reached, it seems to me that no one would feel justified in saying that the conclusion was a wrong one. If, therefore, the facts do not

warrant more than a nominal increase over each annual payment, as I have suggested, I think the arbitrators may safely so increase the rent.

Judgment.

Rose, J.

I therefore answer the second question in the negative, and the answers to the third, fourth and fifth questions will appear in the opinion I have expressed, namely, that in my opinion the rent should be increased by adding to each of the annual payments provided for by the lease such a sum as in the opinion of the arbitrators will be just; that if it appears to the arbitrators that the increase should not be substantial, then by adding a nominal sum to each of the said payments.

I have not considered the question raised on the argument before me as to whether the party claiming to be entitled to the reversion is a party entitled to take advantage of the clause providing for determining the rent by arbitration, such clause providing that the arbitrators are to be chosen, "one by the said parties of the first part," i.e., the lessors named in the lease.

The case comes to me on a statement by the arbitrators that the arbitrators were duly chosen and nominated. If, as a matter of fact and of law, the persons named in the lease as the ones to take advantage of the arbitration clause have not taken advantage of it, and if the parties to this arbitration are not entitled to the advantage of that clause, it may be that the award will not be of any advantage to any one. As I have said, I have not considered this, and express no opinion upon it.

The parties to the arbitration have chosen to enter upon it for some purpose of their own, and the arbitrators have, no doubt, been advised that they should proceed with the reference, and in the progress of the reference they have met with this difficulty which they desire to have removed by obtaining the opinion of the Court upon questions submitted. In my opinion they are entitled to it and accordingly I have expressed an opinion as above stated.



## GRAVES V. GORRIE.

*Copyright—Works of Fine Art—Imperial Act—The Colonies—25-26 Vict.  
ch. 68 (Imp.)*

The Imperial Act, 25-26 Vict. ch. 68, being an Act for amending the law relating to Copyright in Works of Fine Art does not extend to the colonies, and copyright thereby conferred is confined to the United Kingdom.

**Statement.**

THIS was a motion by Henry Graves and Company, Limited, art publishers, of London, England, for an injunction to restrain one George T. Gorrie from making, printing, publishing, selling, or exposing to view any copies, prints, reproductions or representations of a certain picture known as "What we have we'll hold," in breach of the plaintiffs' copyright therein.

The picture in question represented a bull-dog standing on a Union Jack with the sea in the background, and on the line of horizon certain men of war.

An entry was proved in the register of proprietors of copyright in paintings, drawings, and photographs kept at the Hall of the Stationers' Company pursuant to 25-26 Vict. ch. 68 (Imp.), shewing the plaintiffs to be the holders of the Imperial copyright, the date of such entry being November 30th, 1896; and the material shewed that the plaintiffs had granted no rights of reproduction of the picture, but that the defendants had nevertheless distributed and sold in Canada large numbers of printed copies of it.

The motion was argued on September 19th, 1900, having been turned into a motion for judgment.

*J. T. Small*, for the plaintiffs.

*Denton*, Q.C., for the defendant, pointed out that the plaintiffs had no registered Canadian copyright, and contended that the Imperial copyright, under 25-26 Vict. ch. 68, did not extend to Canada, not being made expressly

applicable to the colonies, and that sec. 6 indicated that it was not meant to apply to them as it did not prohibit importation of printed copies into them: *Rex v. Vaughan* (1769), 4 Burr. at p. 2500.

*Small*, in reply, referred to *Routledge v. Low* (1868), L.R. 3 H.L. 100. He contended that 25-26 Vict. ch. 68 (Imp.) was as wide in its application as the Act of 1842, 5-6 Vict. ch. 45 Imp., and referred to the provisions of the International Copyright Act, 1886, 49-50 Vict. ch. 33 (Imp.), especially sec. 8, citing Coppinger on Copyright, 3rd ed., pp. 621-31, and Winslow on Artistic Copyright, p. 93 n.; and that it could not be supposed that the Imperial Parliament was giving protection to foreigners in regard to works of art which it did not give to British subjects: *Regina v. Brierly* (1887), 14 O.R. at p. 531.

*Denton* referred to Coppinger *ibid.* p. 609; Scrutton on Copyright, 3rd ed., p. 199.

November 6th, 1900. ROSE, J.:—

The question to be determined here is whether the copyright, conferred by 25-26 Vict. ch. 68 Imp.), was confined to Great Britain or whether it extended throughout the dominions of the Crown.

As said by Lord Cranworth, in *Routledge v. Low*, L.R. 3 H.L. at p. 113, "The British Parliament in the time of Queen Anne must be taken *prima facie* to have legislated only for Great Britain just as the present Parliament must be taken to legislate only for the United Kingdom." And in *Penley v. Beacon Assurance Co.*, 10 Gr. at p. 428, Vankoughnet, C., said: "While I admit the power of the Imperial Legislature to apply by express words their enactments to this country, I will never admit that without express words they do apply or are intended to so apply."

It is necessary, therefore, carefully to examine the language and effect of the statute to see whether either by

Judgment.

Rose, J.

express words, or at least by necessary implication, it extended to the dominions of the Crown.

In the most carefully prepared and able arguments that were addressed to me by the counsel engaged in this case, much was said with reference to the effect of the language of the first section of the Act, Mr. Small relying upon that as shewing the intention to legislate so as to extend the benefits of the Act not only to Great Britain, but also to the colonies.

There had been some discussion as to the persons to whom the benefits of the prior legislation respecting copyright had been extended, see *Jefferys v. Boosey* (1854), 4 H.L.C. 815, and possibly the language of sec. 1 was made express to prevent any doubt as to the persons who should have the benefit of the Act. The words are: "The author being a British subject or resident within the dominions of the Crown of every original painting, drawing, and photograph, which shall be, or shall have been, made either in the British dominions or elsewhere : : shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing. . ."

These words clearly confer copyright upon all British subjects, and upon all persons whether British subjects or not resident within the dominions of the Crown in respect of every original painting, drawing or photograph, whether made in the British dominions or in a foreign country; but it is quite consistent with that language that the copyright thus conferred should be confined to Great Britain. By sec. 4 no proprietor of any such copyright is entitled to the benefit of the Act until registration at Stationers' Hall. As has been pointed out in the cases, the copyright is conferred by sec. 1, but the benefit of the Act is withheld until registration. By sec. 6 penalties are enacted for importation into any part of the United Kingdom of paintings, etc., which are an infringement of the copyright. By sec. 8 it is provided that pecuniary penalties may be recovered before certain courts in

Judgment.

Rose, J.

England, Ireland, and Scotland; and sec. 9 gives power to Her Majesty Superior Courts of Record at Westminster, and in Dublin, to give protection and relief in cases of infringement. By sec. 10 importation into the United Kingdom is prohibited.

So far, apart from the prohibition on importation, there is nothing to indicate any intention to deal with any act done outside of the United Kingdom.

These sections to which I have referred, when contrasted with the provisions of 5-6 Vict. ch. 45 (Imp.), which is made expressly to extend to every part of the British dominions, give great strength to the argument that it is manifest that Parliament in passing 25-26 Vict. ch. 68 was legislating only for copyright in the United Kingdom, and was not dealing with a copyright conferred for the whole of the dominions of the Crown.

In that Act, sec. 15, it is provided "that if any person shall, in any part of the British dominions, after the passing of this Act, print, or cause to be printed . . . such offender shall be liable to a special action on the case . . . to be brought in any court of record in that part of the British dominions in which the offence shall be committed." Sec. 17 prohibits the importation "into any part of the United Kingdom or into any other part of the British dominions."

But it is said that the language of sec. 10 of ch. 68 shews that no "repetitions, copies or imitations of paintings, drawings, or photographs," shall be made in any foreign state, or in any part of the British dominions, without the consent of the proprietor of the copyright thereof. No doubt for anyone to make a repetition, or copy, or imitation of a painting, drawing, or photograph, without the consent of the proprietor would be a wrong done to such proprietor, but it is apparent that the only protection that that section gives against such wrong is the prohibition against importation of any such unlawful repetition, etc., into the United Kingdom.

Judgment.

Rose, J.

Looking at the Act itself and comparing it with 5-6 Vict. c. 45 (Imp.), I have come to the conclusion that there is nothing on its face to indicate that the copyright thereby conferred extended beyond the United Kingdom.

I find that Lindley, L.J., in *Tuck and Sons v. Priester* (1887), 19 Q.B.D. at p. 643, was apparently of that opinion. His language was, "it appears to me, therefore, that there was vested in the present plaintiffs a copyright in this picture, but that that copyright was conferred by the Act and was confined to this country. They had no copyright abroad. There was no piracy—there was nothing 'unlawful'—in copying in Germany or elsewhere abroad that picture in which the plaintiffs had acquired a copyright under this Act. If by virtue of the international treaties the plaintiffs have a copyright in Germany we have not been informed of it, and I assume that they had not. They are not at liberty therefore to complain under this Act of any infringement of their copyright which took place abroad, for they had no copyright abroad."

Although the learned judge was not dealing with an infringement within the dominions of the Crown, it is, I think, clear that he would have used similar language if he had been dealing with such a case, and his language is a complete answer to the argument which was based upon the language of sec. 10 of ch. 68, namely, "which, contrary to the provisions of this Act, shall have been made in any Foreign State or in any part of the British dominions." It was urged that that language shewed that an infringement made in any part of the British dominions was contrary to the provisions of that Act, but if so, equally would be an infringement outside of the British dominions.

But it was further urged that the effect of 49-50 Vict. ch. 33 (Imp.)\* was to extend the provisions of ch. 68 to all parts of the British dominions, and if not that the language especially of secs. 8 and 9 amounted to a declaration by

\*The International Copyright Act, 1886.

the Imperial Parliament that the provisions of 25-26 Vict. ch. 68 Imp. did so extend.

Judgment.

Rose, J.

It must be remembered that 49-50 Vict. ch. 33 Imp. was passed to extend to authors of literary and artistic works first published in a foreign country, copyright in Great Britain in return for copyright extended to British authors in such foreign country, and was not intended to extend the copyright conferred by any previous Act. We should not, therefore, expect to find a clause declaring that the copyright conferred by ch. 68 was extended beyond the territorial limits named in that Act, unless indeed it were necessary for the working out of the provisions of that Act.

Sec. 8 provides "The Copyright Acts" (which include 25-26 Vict. ch. 68) "shall, subject to the provisions of this Act, apply to a literary or artistic work first produced in a British possession in like manner as they apply to a work first produced in the United Kingdom." This did not extend the language of sec. 1 of 25-26 Vict. ch. 68 Imp. which conferred copyright upon the persons within the class named with respect to every painting, etc., whether made in British dominions or elsewhere, unless the word "production" includes more than the word "made," which I do not understand to be the case, and in any event the section only enlarges the rights and privileges of the proprietors of such works, and does not purport to extend the rights of proprietors of copyright conferred by the copyright Acts.

It must be remembered that in drafting sec. 8 the draftsman had in mind that he was preparing a section which must cover not only 25-26 Vict. ch. 68 Imp., but ch. 45 of 5-6 Vict. Imp. I see nothing in sec. 8 which indicates any intention to extend the copyright conferred by that Act beyond the limits of the United Kingdom. Some of the language of sec. 8 is more peculiarly applicable to the provisions of ch. 45. Even if that section was passed in forgetfulness of the fact, if it be a fact, that the copyright con-

Judgment.  
Rose, J.

ferred by 25-26 Vict. ch. 68 Imp. did not extend beyond the United Kingdom, such forgetfulness or mistake would not enlarge the scope of such Act: *Mollwo v. Court of Wards* (1872), L.R. 4 P.C. at p. 437; *Earl of Shrewsbury v. Scott* (1859), 6 C.B.N.S. at p. 141; *Metcalfe v. Hanson* (1866), L.R. 1 H.L. at 250; *Labrador Company v. The Queen*, [1893] A.C. 104.

As I read ch. 33 of 49-50 Vict. Imp., I do not find any declaration of the meaning of ch. 68 of 25-26 Vict. Imp.

The concluding words of sec. 9 were much pressed upon me by Mr. Small: "But save as provided by such declaration the said Acts and this Act shall apply to every British possession as if it were part of the United Kingdom."

When we come to see what the words "the said Acts and this Act" embraced, we find by looking at the first schedule that only sec. 12 of 25-26 Vict. ch. 68 is included. But Mr. Small urged that as sec. 12 of ch. 68 introduced into that Act the provisions of 7-8 Vict. ch. 12 Imp., it shewed manifestly that ch. 68 extended the copyright to the whole of the Dominions of the Crown.

When we look at the provisions of 7-8 Vict. ch. 12 Imp., we find that its effect is stated in the last recital as follows: "And whereas the powers vested in Her Majesty by the said 'International Copyright Act' are insufficient to enable Her Majesty to confer upon authors of books first published in foreign countries copyright of like duration, and with the like remedies for the infringement thereof, which are conferred and provided by the said 'Copyright Amendment Act,' with respect to authors of books first published in the British dominions . . . and it is expedient to vest increased powers in Her Majesty in this respect. . ." There is nothing here to shew that by its introduction into 25-26 Vict. ch. 68 it was intended to extend the limits of the copyright conferred by that Act. The confining of the declaration in sec. 9 of 49-50 Vict. of ch. 33 Imp., to sec. 12 of

Judgment.

Rose, J.

ch. 68, is significant. Either sec. 1 of ch. 68 did confer copyright extending throughout the dominions of the Crown, or it did not. If it did, then sec. 12 would be as wide in its application as sec. 1 for the purpose for which it was enacted, and there was no necessity for declaring that either section extended beyond the United Kingdom, and if it did not, the confining of the declaration to sec. 12 and thus excluding sec. 1, shews that Parliament carefully avoided extending the effect of sec. 1 as originally passed. I find nothing in sec. 12 of 25-26 Vict. ch. 68, or in 7-8 Vict. ch. 12 Imp., or in 49-50 Vict. ch. 33 Imp., or in the reason for passing such Act, to lead me to the conclusion that it was intended to extend the copyright conferred by sec. 1 of ch. 68 beyond the limits of the United Kingdom.

The result is that I must hold that the copyright conferred by 25-26 Vict. ch. 68, sec. 1 Imp., was confined to the United Kingdom and did not extend to Canada, and that the plaintiff is not entitled to the injunction asked for. His motion therefore must be dismissed with costs in the cause to the defendant in any event.

In addition to the above cases the following authorities may be referred to:—*Smiles v. Belford* (1877), 1 A.R. 436; Coppinger on Copyright, 3rd ed.; Scrutton on Copyright, 3rd ed.; Winslow on Artistic Copyright; and Lefroy on Legislative Power in Canada.

A. H. F. L.



## WILDMAN V. TAIT.

*Assessment and Taxes—Invalid Tax Sale—Insufficient Description—Assessment En Bloc Instead of According to Registered Plan—R.S.O. 1897, ch. 224, secs. 152-155, 208, 209.*

An assessment of lots as "Water Lots 436 x 660" is invalid as not identifying them.

An assessment of lots en bloc after they have been subdivided by registered plan, and without shewing the known owner against whom particular parcels are assessable, is invalid as disregarding the essential requirements of R.S.O. ch. 224, sec. 13.

The requirements of R.S.O. ch. 224, secs. 147, 152-5 inclusive, as to the duties of the collector, treasurer, clerk and assessor, with reference to the list of lands liable to be sold, were held not to have been complied with in this case; and the defects were held not to have been cured by sec. 208, which makes the tax deed binding if the land is not redeemed in one year, nor by sec. 209, by which the deed is valid if not questioned within two years.

**Statement.**

THIS action was brought to have a tax sale and subsequent conveyance by the tax purchaser to the defendant G. P. Magann of water lots 25 and 26, plan 549, in the city of Toronto, declared void on the grounds stated in the judgment.

The action was tried at Toronto, before MACMAHON, J., without a jury, in September, 1900.

*H. T. Beck*, for the plaintiff.

*A. C. Macdonell* for the defendant G. P. Magann.

Written arguments were filed on behalf of the parties. That for the plaintiff contended that the tax sale was void and should be so declared upon the grounds on which the judgment proceeds, citing: *Christie v. Johnston* (1866), 12 Gr. 534; *Ley v. Wright* (1876), 27 C.P. 522; *Fleming v. McNabb* (1883), 8 A.R. 656; *Beckett v. Johnston* (1882), 32 C.P. 301, especially at pp. 316, 318, 321; *Hill v. Macaulay* (1884), 6 O.R. 251; Black on Tax Titles, 2nd ed. secs. 18, 102, 103, 105; *Jeffrey v. Hewis* (1885), 9 O.R. 364; *McKay v. Cryslar* (1879), 3 S.C.R. 436; *Whelan v. Ryan* (1891), 20 S.C.R. 65; *Nicholls v. Cumming* (1877), 1

S.C.R. 395; *Love v. Webster* (1895), 26 O.R. 453; *Deverill v. Coe* (1886), 11 O.R. 222. Argument.

In the argument for the defendant Magann it was contended that inasmuch as Andrew Tait was no longer a party to the action, which had been abandoned as against him without the consent of Magann, the deed of the latter could not be set aside; that all the objections of the plaintiff with regard to the tax deed were cured by the lapse of the statutory period: R.S.O. ch. 224, sec. 209; that the assessments and returns of the collector for the years of 1890 and 1891 were sufficient, as were those also for 1892 and 1893; that if the law were as the plaintiff contended every property would have to be examined by the assessors every year in the Registry Office, as the assessor in this case could have discovered in no other way that Clement owned the equity in the water lots; that both Clement and the plaintiff were estopped and precluded by their laches from alleging irregularities in the assessment; that the plaintiff being a non-resident, the assessment complied fully with the requirements of the non-resident clauses of the Act: R.S.O. ch. 224, secs. 20-2, 34; that including extra-territorial property with property within the municipality in the assessment will not avoid the latter, unless the taxation be thereby increased, which the evidence shews was not the case here.

In reply the plaintiff contended that no action or inaction of Clement could validate the sale founded on what was practically no assessment; that there was nothing unreasonable in an assessor having to resort to the Registry Office to ascertain the description and ownership of property; and that the assessment in question was not on the non-resident, but on the resident roll.

November 12th, 1900. MACMAHON, J. :—

On October 28th, 1899, the plaintiff, on filing the consent of the defendant Andrew Tait, obtained an order dismissing the action against him without costs.

Judgment.

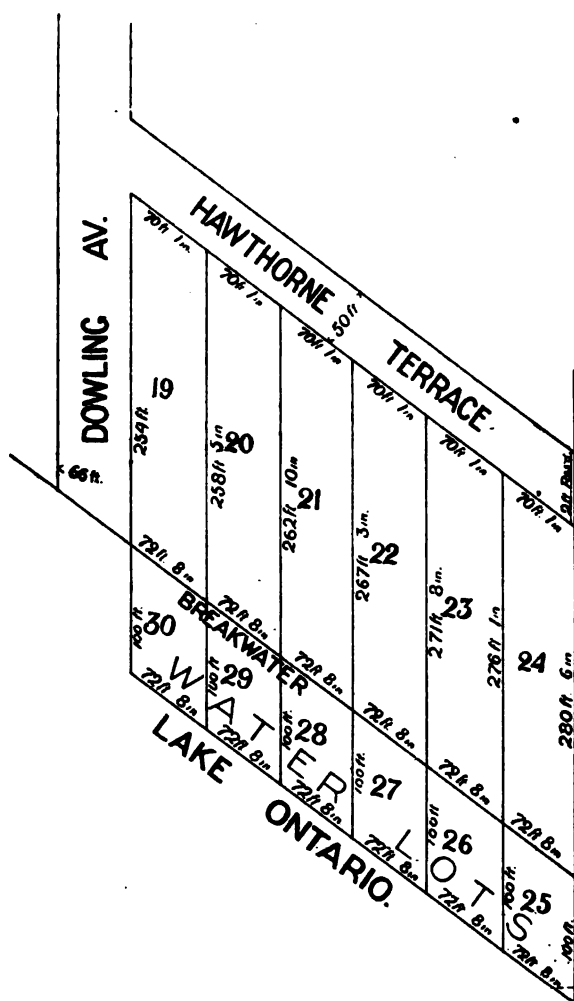
MacMahon, J.

The action is brought to have it declared that a certain deed made by the treasurer and corporation of the city of Toronto to Andrew Tait, and an alleged sale to him of certain lands in the city of Toronto, composed of water lots 25, 26, 27, 28, 29 and 30, according to plan number 549 filed in the Registry Office of the said city, together with the water lot lying south of said water lots, more particularly described as follows: "Commencing at the north-west angle of said lot number 30, thence easterly along the northerly limits of said lots numbers 30, 29, 28, 27, 26 and 25, to the north-east angle of the said lot number 25, thence southerly along the east limit of said lot number 25, and along the southerly production thereof, in all a distance of 660 feet, thence westerly parallel with the said northerly limit of said lots 30, 29, 28, 27, 26 and 25 to a point in the production southerly of the west limit of said lot number 30 and distant 660 feet measured southerly thereon from the north-west angle of said lot number 30, thence northerly along that production and along the said west limit of lot number 30 to the place of beginning," which deed purported to be made pursuant to the Assessment Act then in force in this province and pursuant to a tax sale held on March 12th, 1895, for the price of \$123.75, taxes to December 31st, 1893, and was by the said Andrew Tait caused to be registered in the Registry Office of the western division of the city of Toronto on or about September 2nd, 1896, is, in so far as the same affects the said water lots 25 and 26, null and void.

The following is a sketch of that part of plan number 549 which includes the water lots mentioned, numbered from 25 to 30 inclusive, in the deed from the city of Toronto to Tait.

Judgment.

MacMahon, J.



Tait on June 12th, 1898, conveyed to the defendant Magann for the express consideration of \$168.81 the lands and premises described in the above mentioned deed from the mayor and treasurer of the corporation of the city of Toronto. The conveyance to Magann was registered on June 28th, 1898.

Judgment.

MacMahon, J.

The Crown on May 27th, 1875, granted to Peter D. Conger the water lot in front of park lot number 68, being a lot in the registered subdivision of part of lot number 33 in the broken front concession of the township of York, having a frontage on the shore of Lake Ontario of 6 chains 46 links, and running into the lake 5 chains.

Park lot number 68 was sub-divided into six lots numbered 19, 20, 21, 22, 23 and 24 on the south side of Hawthorne terrace, in Parkdale, by plan number 549, filed in the Registry Office on May 30th, 1883; and the water lots in rear of the lots so sub-divided are numbered respectively 30, 29, 28, 27, 26 and 25, each having a frontage on the lake shore according to said plan of 72 feet 8 inches, and running into the lake 100 feet. Water lots 25 and 26 are in the rear respectively of lots 24 and 23 on the south side of Hawthorne terrace.

Charles Frankish, who was the owner in fee of lots 23 and 24 on the south side of Hawthorne terrace and also of water lots 25 and 26 in the rear of said lots as laid out on plan number 549, conveyed the same by deed bearing date July 2nd, 1883, to William H. P. Clement, of Toronto, barrister.

The town of Parkdale was annexed to the city of Toronto in 1889 by 52 Vict. ch. 73, sec. 12 (O).

On November 5th, 1891, Clement mortgaged the said lands mentioned in the deed to him to the plaintiff to secure payment of the sum of \$4,000.

On May 1st, 1893, Clement conveyed his equity of redemption in the premises conveyed by Frankish to him to his mother, Mrs. C. Clement. And on June 16th, 1899, Mrs. C. Clement released all her interest in the said lots to the plaintiff.

The six water lots numbered from 25 to 30 on plan 549 were assessed for the years 1890 and 1891 as follows:

Occupant.	Owner.	Size of lot.
Water lot	John Maughan	436 x 660

In 1892 these lots were assessed separately, thus:

Judgment.

Occupant.	Occupation.	Owner.	Street of lot.	Size of lot.
Water lot	Omit John	John Maughan	25	70' 6" x 660
Water lot	Maughan as	John Maughan	26	70' 6" x 660
Water lot	owner and	John Maughan	27	70' 6" x 660
Water lot	insert	John Maughan	28	70' 6" x 660
Water lot	owner	John Maughan	29	70' 6" x 660
Water lot	unknown	John Maughan	30	70' 6" x 660

MacMahon, J.

In 1893 each lot was assessed separately as "water lot" owner "unknown," the number and size of each lot being given as in the assessment of 1892.

The collector's roll for 1890 follows the assessment with the description: "Water lots on lake shore continued."

Occupant.	Owner.	Feet frontage.	Value of real property.
Water lot	John Maughan	436	\$872

The roll for 1891 is a copy of that for 1890, except as to the value which is placed at \$1,744.

In the roll for 1892 each lot from 25 to 30 is rated separately as a "water lot," "owner unknown," the frontage of each lot being entered at 70 feet 6 inches, and the assessed value of each at \$282.

The roll for 1893 is the same as the roll for 1892.

The collector's final return for 1890 shews:

Name.	Street.	Frontage.	Ass't.	Total taxes.	Reasons for non-payment.
John Maughan	Water lot	436	\$872	\$12.65	Vacant land

The "final return" for 1891 is the same as that for 1890, except that the "total taxes" are placed at \$29.22, and in the column under "reasons for non-payment" is "no goods."

The final return for 1893 gives the owner as "unknown," and each lot from 25 to 30 inclusive is entered separately as "Water lot"; the assessment is entered at \$4.09; the total taxes on each are also entered at \$4.09; and under "reasons for non-payment" "V.L." (meaning vacant land) is placed opposite the registered folio number of each lot.

Judgment.

MacMahon, J.

The final return for 1893 follows that for 1892, except that the "frontage" of each of the lots is given at 70 feet 6 inches; the assessment on each lot is entered at \$282; the total taxes on each at \$4.87; and the reason for non-payment is "water lot."

In the list of lands liable to be sold for arrears of taxes in the year 1894, furnished by the city treasurer to the city clerk, the "owner assessed" is "John Maughan," the "years in arrear" are "1890, 1891"; the description given of the property is "water lot" and "unoccupied"; under the "name of owner" is inserted "unknown," and under "lot No." is entered "25, 26, 27, 28, 29, 30"; and under "general remarks" is "only 423 feet."

The advertisement of sale described the property as "water lots on lake shore 436 x 660, being lots 25, 26, 27, 28, 29, 30," and the "years of arrears" are stated to be 1890, 1891, 1892, 1893, and the amount of taxes in arrear \$118.59.

The tax sale at which Tait became the purchaser took place, as already stated, on March 12th, 1895, and the deed from the corporation of Toronto to him is dated January 24th, 1896.

Mr. Clement always paid the taxes on lots 23 and 24 on Hawthorne terrace, but he was never assessed for water lots 25 and 26 in the rear, although covered by his deed.

The assessments for the years 1890 and 1891 are clearly invalid. "Water lot 436 x 660" conveys no description. It may be anywhere, either in Toronto Bay or east of it, or west in the direction of Humber Bay. The description is no better and as valueless in the way of information as if the assessment had been of a "park lot" without giving the number of the lot or stating the street on which it was situated.

Another reason why the assessment is invalid is that these "water lots" are numbered according to a registered plan on which the dimensions of the lots are given, and instead of being assessed as numbered lots according to

this plan, they are assessed *en bloc* as having a frontage on the shore line of Lake Ontario of 436 feet, by a depth south into the lake of 660 feet, thus disregarding the essential requirements of sec. 13 of the Assessment Act, R.S.O. (1897), ch. 224, the whole of the six lots being assessed together to John Maughan as owner. Under such assessment Mr. Clement, the owner of water lots 25 and 26, could not be notified of any taxes due on those lots for the years 1890 and 1891, as they had not been assessed as lots, but assessed along with property not owned by Mr. Clement, and as containing a depth of 660 feet, while the plan under which they were conveyed to Mr. Clement shewed a depth of 100 feet. The assessment of a depth of 660 feet was beyond the territorial limits of the city of Toronto, which only reached five chains (330 feet) into the waters of Lake Ontario in front of park lot 68 according to the Crown grant to Peter D. Conger. No notice of assessment was ever given to Mr. Clement, who was a known owner, and none could have been given to the plaintiff, as she became mortgagee in November, 1891, which would be after the assessment for 1892 was completed.

So that even without considering the other points raised in the case, the plaintiff, under the authority of *Beckett v. Johnston*, 32 C.P. 301, per Wilson, C.J., at p. 318, and per Osler, J., at pp. 321 and 323, and *Hill v. Macaulay*, 6 O.R. 251, would be entitled to judgment. See also *Black on Tax Titles* (2nd ed.) sec. 18.

Although a copy of the list of lands liable to be sold for taxes in arrear for 1890 and 1891 by the treasurer to the city clerk in 1894 is required by sec. 152 of R.S.O. ch. 224, the latter failed to deliver to the assessor in each year a copy of such list as required by sec. 153, and therefore the assessor was not called upon to perform the duties prescribed by the section of ascertaining "if any of the lots or parcels of land contained in such list are occupied, or are incorrectly described, and to notify such

Judgment.

MacMahon, J.



Judgment.  
MacMahon, J.

occupants and also the owners thereof, if known, whether resident within the municipality or not, upon their respective assessment notices, that the land is liable to be sold for arrears of taxes, and to enter in a column (to be reserved for the purpose) the words "Occupied and parties notified," or "Not occupied," or "Incorrectly described," as the case may be; and all such lists shall be signed by the assessor or assessors and returned to the clerk with the assessment roll, together with a memorandum of any error discovered therein, and the clerk shall file the same in his office for public use; and furnish forthwith to the county treasurer a true copy of the same, certified to by him, under the seal of the corporation; and every such list, or copy thereof, shall be received in any Court as evidence in any case arising concerning the assessment of such lands."

The assessor is required, by sec. 154, to certify to the correctness of the list.

In consequence of the failure of the city clerk to comply with sec. 153, it became impossible to carry out the directions in sec. 154. And as there were no lists the treasurer could not be furnished with a copy thereof.

Sec. 176 provides that "The treasurer shall not sell any lands which have not been included in the lists furnished by him to the clerks of the several municipalities in the month of January preceding the sale, nor any of the lands which have been returned to him as being occupied under the provisions of sec. 155 of this Act, except the lands, the arrears for which had been placed on the collector's roll of the preceding year, and again returned unpaid and still in arrear in consequence of insufficient distress being found on the lands."

As already pointed out, there was no compliance with secs. 153 and 154, and therefore the clerk could not furnish the treasurer with the list prescribed to be furnished by sec. 155.

There was, as far as the returns required by sec. 147 are concerned, no compliance with the Act, and, as stated

by Mr. Justice Gwynne in delivering the judgment of the Supreme Court in *The City of Toronto v. Custon* (1900), 30 S.C.R. at p. 395, "the duties prescribed in sec. 135 (now sec. 147) are enacted as the basis and foundation of all subsequent proceedings which are authorized to be taken for the recovery of taxes not paid while the roll remains in the collector's hands unreturned; and that, therefore, the requirements prescribed by the section are imperative."

Judgment.

MacMahon, J.

In *Love v. Webster*, 26 O.R. 453 (following *Town of Trenton v. Dyer* (1893), 21 A.R. 379), Armour, C.J., held that the failure to comply with the provisions of secs. 141 and 142 of 'he Consolidated Assessment Act of 1892, 55 Vict. ch. 48, O. (now R.S.O. 1897, ch. 224, secs. 153 and 154), requiring a true copy of the lists returned by the assessor to the clerk, certified by the latter under the seal of the corporation to be furnished to the treasurer, formed a fatal objection to the validity of the sale.

The defects referred to in this case are not cured by secs. 208 and 209 of the Act. See the observations of the present Chief Justice of the Supreme Court (Sir Henry Strong), in *Whelan v. Ryan*, 20 S.C.R. at p. 72, where he observes upon *McKay v. Chrysler*, 3 S.C.R. 436, and deals with the curative clause of the Manitoba statute, 45 Vict. ch. 16, sec. 7. See also *Haisley v. Somers* (1887), 13 O.R. 601, 605; *Hall v. Farquharson* (1888), 15 A.R. at p. 459; *Donovon v. Hogan* (1888), 15 A.R. 432; *Dalziel v. Mallory* (1888), 15 O.R. 80.

There must be judgment for the plaintiff declaring that the sale of the lots in question, being water lots 25 and 26 according to plan number 549, was illegal and void, and that she is, as to these lots, entitled to have the tax-deed cancelled.

These lots were never assessed as such, and there being no taxes in arrear in respect thereof, Tait never became a tax purchaser.

The defendant Magann must pay the plaintiff's costs.

A. H. F. L.

## MCNEVIN V. CANADIAN RAILWAY ACCIDENT INS. CO.

*Insurance — Accident Insurance — Hazardous Occupation — Voluntary Exposure—Unnecessary Danger.*

The insured, who was a baggageman at a railway station, received the injuries which caused his death while in the act of coupling cars, which was not part of his duty as baggageman. The evidence shewed that he had coupled cars on other occasions, and that on this occasion he understood the brakeman to request him to make the coupling. In his application for an accident insurance policy he was described as a baggageman, and in the policy there was the following clause, which was also contained in the application: "1. If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." By clause 4 it was provided that the contract should not cover death resulting from "voluntary exposure to unnecessary danger:"—

*Held*, that the words "occupation or exposure" did not apply to the insured's casual act of coupling, nor was there "voluntary exposure to unnecessary danger."

**Statement.**

ACTION brought by Louisa McNevin, as the beneficiary named in an accident insurance policy issued by the defendants upon the life of Alexander McNevin, deceased, to recover the sum of \$1,000, being the amount payable under the policy, and interest thereon.

The plaintiff alleged that on the 30th July, 1899, at the town of Arnprior, the said Alexander McNevin, her son, was accidentally killed, a train passing over him and causing his death.

The defendants alleged that the deceased was baggageman at the station at Arnprior, and so stated in his application for insurance; that his death was caused by an accident while he was engaged in coupling cars, which was not part of his duty, and not covered by the policy; that the deceased voluntarily performed, or was in the act of performing, a dangerous duty outside of his employment when the accident happened, and they were not liable under the terms of the policy; that if they could be made liable at all upon the policy, it would be only for such sum as the deceased would have been insured for, having regard

to the premiums paid by him, in an occupation or exposure more hazardous than that stated in his application; that the defendants had tendered \$159.57 to the plaintiff before action, and had since paid that amount into Court.

Statement.

The action was tried before FALCONBRIDGE, C.J., and a jury, at Pembroke, on the 29th May, 1900. The evidence is sufficiently stated in the judgment.

The argument was heard at the conclusion of the evidence, and, by permission, memoranda of authorities were put in by the defendants on the 2nd and 8th June, and by the plaintiff on the 29th June, 1900.

*McGarry* and *Devine*, for the plaintiff.

*W. R. White*, Q.C., and *Fripp*, for the defendants.

August 27, 1900. FALCONBRIDGE, C.J.:—

That the insured Alexander McNevin received the injuries which caused his death while in the act of coupling, or immediately after coupling, cars of a freight train, appears by the proofs of loss, and is the necessary result of the evidence given before me.

That this act was not part of his duty as baggageman at station, clearly appears from the evidence of the plaintiff's witness Jamieson, and from the evidence of the operator Robertson, and other witnesses for the defence.

The evidence shews, further, that this was not the only occasion on which the insured coupled cars. To what extent he was in the habit of doing so is to be gathered from the following extracts. The station agent says:—  
“ . . . I have seen him couple cars . . . ” Henry Hatton, carter, (also called by the plaintiff) says:—“ I have seen him couple cars pretty often. He was a good coupler.” Henry Dunham (conductor) says:—“ I had seen him couple other cars, I believe, and I believe I told him to look out he did not get hurt.”

The risk on a baggageman at station is “ordinary,” the limit is \$2,000, and the premium is \$7.50 per \$1,000.

Judgment.  
Falconbridge,  
C.J.

The risk of a baggageman on a train is higher ; but the hazard on a brakesman is still more increased. I do not think its classification was stated, but the limit is \$500, and the premium rate for \$1,000 per annum is \$29.

Clause 13 of the application is as follows :—"I understand the classification of risks, and agree that for any injury received in any occupation or exposure classed by this company as more hazardous than those above stated, I shall be entitled to recover only such amount as the premium paid by me would purchase at the rates fixed for such increased hazard."

Clause 4 indorsed on the policy is as follows :—

"4. This contract does not cover . . . accident nor death . . . resulting wholly or partly, directly or indirectly, from any of the following causes . . . violating a rule of any corporation, voluntary exposure to unnecessary danger . . ."

The company tendered and have paid into Court the amount which the premium paid would purchase at the rates fixed for the increased hazard.

This the defendants assume to do under clause 13 of the application and clause 1 of the policy, which is as follows :—"1. If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard."

Such a provision as this has been held in the United States to be a competent limitation of the policy : *American and English Encyclopædia of Law*, 2nd ed., I. 302 ; *Standard L., etc., Ins. Co. v. Martin* (1892), 133 Ind. 376. This case, amongst others cited at p. 306 of the *Encyclopædia*, recognizes the commendable rules that in case of doubt, in a policy of life insurance, the construction most favourable to the insured will be adopted, and that a forfeiture will not be enforced unless unavoidable. "But," (*per* Lindley, L.J., in *Cornish v. Accident Ins. Co.* (1889),

23 Q.B.D. at p. 456,) "this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty."

Judgment.  
Falconbridge,  
C.J.

"Voluntary exposure" is defined in the *Encyclopædia*, p. 307, to imply "conscious intentional exposure—something which one is willing to take the risk of. It must appear that the act, in order to come within the exception, was one which reasonable and ordinary prudence would pronounce dangerous, and that the accident was a consequence thereof." The definition in the *Cornish* case (*ubi supra*) is similar in its terms.

Not every act of negligence will prevent a recovery under such a provision, and in American cases cited on p. 304 it is held that the plaintiff has not the burthen of establishing the absence of voluntary exposure to unnecessary danger.

And by R.S.O. 1897 ch. 203, the Ontario Insurance Act, sec. 153, sub-sec. (1), where the event has happened on the occurrence of which the insurance is payable, the maximum amount named in the contract shall *prima facie* be payable, and it shall lie on the insurer to prove the contrary.

I would not regard the words of clause 13 of the application as seriously standing in the way of the plaintiff's recovery. I would read "occupation" as meaning occupation or employment as a usual business, not as a casual or isolated act or series of casual acts in the intervals of ordinary employment: *May on Insurance*, 3rd ed., p. 1228, sec. 532; *Providence Life Ins., etc., Co. v. Martin* (1869), 32 Md. R. 310.

In the case of *Stone v. United States Casualty Co.* (1871), 34 N.J. Law Reps. 371, the policy contained a provision that policy holders insured under the preferred class would not be entitled to recover for injuries received in any employment or by any exposure either more hazardous in itself, or classified by the company as more hazardous,

Judgmet.  
Falconbridge,  
C.J.

than the occupation named in the preferred class. Chief Justice Beasley in giving the judgment of the Court, at p. 375, in discussing this clause, says:—

“These terms, literally rendered, require that the assured, to come within their effect, must, at the time of the injury, be in an employment more dangerous than his own. The language has respect to employments, and not to individual acts. It is true that a certain degree of ambiguity is introduced by the expression ‘other exposure,’ but looking at the body of the policy we find these terms used in the sense of the risks arising from a business or occupation. . . . If the company intended to say to the assured that if he did any act which did not strictly belong to his own occupation, but was embraced more properly in some other business, and if thereby any harm to him accidentally resulted, that in such event he could claim nothing under his policy, it was easy for them to do so in plain language. . . . A qualification of the agreement so restrictive of the rights of the party insured ought not to be attempted, unless the terms of this indorsement will bear no other rational interpretation. If the terms used are imperfect or ambiguous, it is the fault of the defendants; it is their contract, and the construction of it must be most strongly against them.”

The learned Judge then discussed the practical interpretation of the clause if interpreted as contended for by the accident insurance company, and says, at p. 376:—

“It does not seem to me proper to bring into this agreement this confusion and uncertainty of construction. It certainly is not necessary for the reasonable protection of the company, for there are other restrictions in this instrument which are apparently sufficient to debar a party insured from doing acts appertaining to other occupations, which are of a particularly hazardous nature. I refer to the clause forbidding undue exposure.”

In this view of the meaning of the word “occupation” in clause 13, the addition of the words “or exposure” has

reference to, and is a mere expansion of, what precedes, and these words give no cumulative force or weight to the defendants' contention.

Judgment.  
Falconbridge,  
C.J.

Finding nothing in clause 13 to bar the plaintiff's recovery, I take it that clause 1 of the policy falls with it, and I come now to consider clause 4:—"This insurance does not cover . . . voluntary exposure to unnecessary danger. . . ."

There is a good example of a clear case of voluntary exposure to unnecessary danger in *Williams v. United States Mutual, etc., Ass'n.* (1892), 133 N.Y. 366, where the assured, without any apparent reason, deliberately went and "squatted down" in front of a moving engine, and another in *Sawtelle v. Railway Passenger Assurance Co.* (1878), 15 Blatchford 216.

These and other cases present features widely differing from the one in hand. Frederick Hudson, a witness called for the defence, says on cross-examination:—"I understood Carroll" (the brakeman on the train) "to ask him (deceased) to make the coupling." If Hudson so understood, I am justified in finding, and I do find as a fact, that deceased understood Carroll to ask him to make the coupling.

All the burthens are on the defendants, and they have not shewn that deceased would not, under these circumstances, believe it to be his duty (whether it was in truth his duty or not) to make the coupling, in compliance with the order or request of Carroll. And so his exposure would not be voluntary, and I find that it was not voluntary.

There are some of the American authorities which do not appear to be in consonance with the above results on either point, but, whilst they are entitled to high respect, they are not binding upon me, and I do not now distinguish them, but I believe that all or most of them are capable of distinguishment.



Judgment.Falconbridge,  
C.J.

Judgment for plaintiff for the full amount claimed, viz., \$1,000, with interest from the 22nd November, 1899, with full costs.

E. B. B.

[This case has since been carried to the Court of Appeal.]

## [DIVISIONAL COURT.]

## SCRIVER V. LOWE ET AL.

*Negligence — Contributory Negligence — Nonsuit — Undisputed Facts — Inference.*

In actions for negligence the power of the Judge to nonsuit on the ground of contributory negligence is restricted to cases where it is plain and indisputable that the injury of which the plaintiff complains would not have occurred but for his own want of proper care. Where the facts, or the proper inference from the facts, are in dispute, the case must go to the jury.

And where the defendants negligently left a hole in the floor of a room unguarded, and the plaintiff, going into the room, saw the danger and at first avoided it, but, on turning to go out again, lost sight of it, stepped into the hole, and was injured :—

*Held*, these facts being undisputed, that it was properly left to the jury to say whether she was negligent or not.

Statement.

THIS action was brought in the County Court of Wentworth to recover damages for personal injuries sustained by the plaintiff owing to the alleged negligence of the defendants.

The defendants were engaged in putting electrical fittings into a house in the city of Hamilton in which the plaintiff was a lodger; and, leaving their work to go to dinner at mid-day, left in an unprotected state two holes in the floor of the bath-room, one of which they had made for the purposes of the work, and the other of which was a stove-pipe hole, which they had uncovered. While they were absent the plaintiff went into the bath-room to wash her hands; she observed the holes, and avoided them in going to the wash-stand, but, on leaving it, she forgot one

of the holes, stepped into it, and was bruised and strained in consequence.

Statement.

These were the undisputed facts. The Judge of the County Court refused to nonsuit, and let the case go to the jury, who returned a verdict in the plaintiff's favour for \$50 damages, for which sum judgment was ordered to be entered.

The defendants appealed, and their appeal was heard by a Divisional Court, composed of BOYD, C., FERGUSON and ROBERTSON, JJ., on the 6th December, 1900.

*McBrayne*, for the defendants. There should have been a nonsuit on the ground of contributory negligence upon the undisputed facts of the case. The plaintiff's knowledge of the danger had the same effect as if the defendants had warned her to be careful, and if they had warned her they would not be liable: *Manchester, etc., R.W. Co. v. Woodcock* (1871), 25 L.T.N.S. 335; *Brown v. Trustees of Toronto General Hospital* (1893), 23 O.R. 599; *Butterfield v. Forrester* (1809), 11 East 60; *Headford v. McClary Mfg. Co.* (1893-5), 23 O.R. 335, 21 A.R. 164, 24 S.C.R. 291; *McShane v. Baxter* (1890), 7 Times L.R. 58.

*Washington, Q.C.*, for the plaintiff. In the cases cited there was no negligence of the defendants. Forgetfulness is not contributory negligence: *Gordon v. City of Belleville* (1887), 15 O.R. 26; *Tobin v. New Glasgow Iron, etc., Co.* (1894), 26 N.S. Reps. 268, affirmed by the Supreme Court of Canada, 7th November, 1894, Coutlee's Dig. 100; *S.C.* (1896), 29 N.S. Reps. 70; *Bliss v. Boeckh* (1885), 8 O.R. 451; *Boyle v. Town of Dundas* (1876), 27 C.P. 129. As to when contributory negligence affords a ground for nonsuit, see *Morrow v. Canadian Pacific R. W. Co.* (1894), 21 A.R. 149; *Edgar v. Northern R.W. Co.* (1884), 11 A.R. 452.

December 10, 1900. BOYD, C.:—

The practice of nonsuit in questions of contributory negligence is of recent introduction. It arose after the

Judgment.

Boyd, C.

decision of *Davey v. London and South Western R.W. Co.* (1883), 12 Q.B.D. 70, but by later authorities it is to be restricted to cases where it is plain and indisputable that the accident would not have occurred but for the plaintiff's own want of proper care. If it be a doubtful matter, and if the evidence may reasonably be interpreted either way—if, on the one hand, it amounted to contributory negligence, and on the other, it did not—then it becomes a question for the jury, and the Judge cannot nonsuit: *Brown v. Great Western R.W. Co.* (1885), 52 L.T.N.S. 622, 624.

In *Smith v. South Eastern R.W. Co.*, [1896] 1 Q.B. at p. 188, Kay, L.J., says: "I venture to say . . . that as long as we have trial by jury, and juries are judges of the facts, it should be a very exceptional case in which the Judge could so weigh the facts and say that their weight on the one side and the other was exactly equal." The Lord Justice was dealing with a case where it was argued that the accident was as much owing to the want of care on the part of the person injured as to any negligence on the part of the defendants.

It appears manifest that *Davey v. London and South Western R.W. Co.* is to be used with great caution after what is said in *White v. Barry R.W. Co.* (1899), 15 Times L.R. 474.

On matters of negligence, the Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from these facts, when submitted to them, negligence *ought to be* inferred: Lord Cairns, *Metropolitan R.W. Co. v. Jackson* (1877), 3 App. Cas. at p. 197.

If the question is as to the plaintiff's negligence contributing to the tort, the facts may be so clear and decided that the inference of negligence is irresistible, and in every such case it is the duty of the Judge to decide; but, when the facts, or the inference to be drawn from them, are *in any degree doubtful*, the only proper rule is

to submit the whole matter to the jury under proper instructions: *Mason, J., in Keller v. New York Central R. R. Co.* (1861), 24 How. Pr. 172, 177, cited in *Beven on Negligence*, 1st ed., p. 11, note. This passage has been adopted by the author as his own in the 2nd ed., p. 12, note 3 (1895). So, in another case, Mr. Chief Justice Cooley has said: "When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury:" *Detroit and Milwaukee R.R. Co. v. Van Steinburg* (1868), 17 Mich. 99, 122-3.

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Boyd, C.

In the present case the plaintiff, seeing at first the danger, did not walk into it. She turned aside to wash her hands, and her attention became thus so diverted that she forgot one place of danger in seeking to avoid another. Opinions and conclusions among men may differ as to whether she was to be excused, or blamed, *i.e.*, whether she was negligent or not, and in such a case the better course is to leave it to the jury: see *per Brett, M.R., in Wakelin v. London and South Western R.W. Co.* (1886), reported in a note to *Smith v. South Eastern R.W. Co.*, [1896] 1 Q.B. 178, at p. 192.

The judgment should be affirmed with costs.

ROBERTSON, J.:—

As a general rule, contributory negligence is a question to be disposed of by the jury. It is a question of fact, but it may be so patent that the Judge would be justified in withdrawing the case from the jury; but in this case the circumstances were so peculiar that I think it would have been error had the case been withdrawn. It was a case of "momentary forgetfulness," and that, in my judgment, does not constitute negligence. Plaintiff had not seen the holes in the floor before the occasion in question. She stepped over the one at the door, when she saw the other in front of the wash-stand, which she went to the

Judgment.  
Robertson, J.

bath-room to use. Instead of standing in front of the wash-stand, to avoid the larger hole she stood at the end of it, and her skirts apparently covered the other. After performing her ablutions, she turned round to leave the stand, and, in turning, one of her feet went into the other hole, and the injury was occasioned thereby. To my mind, there could be very little doubt as to the inference to be drawn from these circumstances, but it was not for the Judge to say; it was a question of fact as to what was the proper inference to be deduced from the facts in proof, and in that case it was for the jury to decide: as to which, see the judgment of Lord FitzGerald in *Wakelin v. London and South Western R.W. Co.* (1886), 12 App. Cas. at p. 52.

In *Wallace v. Culter Mills Paper Co.* (1892), 29 Scottish Law Reporter at p. 789, Lord Kinnear says: "The question whether a man who knows of his danger has agreed to take the risk upon himself is a question of fact to be determined with reference to all the circumstances of the case." Now, the peculiar circumstances here come within the principle here enunciated: there was a doubt as to the proper inference to be drawn; the defendants contended that it was clear against the plaintiff; the plaintiff contended otherwise. In my judgment, it was not so. I think the jury came to the proper conclusion, and the learned County Judge was right in not withdrawing the case.

The damages allowed were moderate—altogether too moderate, I think. It was little short of gross negligence on the part of the defendants to leave these openings in a bath-room floor, which they must have known was in constant use; and, taking into account that the plaintiff was confined to her bed for five weeks, and incurred medical expense to the amount of \$19, and for nursing \$25, little or nothing was allowed for pain and suffering, etc.

The appeal should be dismissed with costs.

See, also, *Boyle v. Town of Dundas* 27 C.P. 129; *Bliss v. Boeckh*, 8 O.R. 451; *Gordon v. City of Belleville*, 15 O.R. 26; *Morrow v. Canadian Pacific R. W. Co.*, 21 A.R. 149.

Judgment.  
Robertson, J.

FERGUSON, J. :—

I agree in the conclusion.

E. R. B.

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[DIVISIONAL COURT.]

HARPER V. HAMILTON RETAIL GROCERS' ASSOCIATION  
ET AL.

*Defamation—Libel—Privilege—Interest—Publication to Clerk—Finding of Jury.*

One of the defendants, the secretary of a trade association, prepared a statement for circulation among the members of the association, and gave it to a person whom he occasionally employed, with instructions to copy it. This statement contained an allegation that the plaintiff was unworthy of credit :—

*Held*, that, as the publication to the members of the association would have been privileged, in the absence of malice, on the ground of interest, the publication to the copyist was also privileged, being a reasonable means employed to make the communication to the others. *Lawless v. Anglo-Egyptian Cotton and Oil Co.* (1869), L.R. 4 Q.B. 262, followed.

*Held*, also, that the finding of the jury that "there was no ground of action" was in effect a finding that the words were not defamatory.

THIS was an action for defamation brought by William Harper, a servant of the Hamilton Street Railway Company, against the association, an unincorporated body, one William Harvey, the secretary of the association, and certain other persons alleged to be members and officers of the association.

Statement.

The statement of claim alleged that the defendants, falsely, fraudulently, and maliciously, wrote, printed, and published, and caused to be printed and published and to be circulated among a large number of merchants and

## Statement

store-keepers in the city of Hamilton, of and concerning the plaintiff, certain libellous bulletins or reports, which were read by such merchants and others, and which contained the following reference to the plaintiff, among others:—"The following names having been dealt with through the collection department are found to be unworthy of credit, and cash dealings are advised: . . . William Harper, c/o Hamilton Street Railway Company."

It was further alleged that the necessary and intended consequence of such publication was to injure and defame the reputation of the plaintiff and to degrade him and subject him to annoyance, ridicule, and disgrace, and to make him seem guilty of fraud and dishonesty and appear unworthy of trust and credit, and to imply that he was a cheat and a swindler.

The plaintiff claimed \$3,000 damages.

The defence denied the allegations of the plaintiff and asserted privilege by reason of the interest of those to whom the communication was addressed, and alleged that the plaintiff was in debt and that a judgment had been recovered against him.

The action was tried before STREET, J., and a jury, at Hamilton, on the 19th April, 1900.

*Wallace Nesbitt*, Q.C., and *Washington*, Q.C., for the plaintiff.

*Lynch-Stuunton*, Q.C., for the defendants.

Ellen Anderson, a witness called by the plaintiff, said she was a stenographer in her father's office; the defendant Harvey asked her to do some work for him; she remembered "doing" the list containing the plaintiff's name; Harvey gave her a book with the names in it; she believed that a list shewn to her was a correct transcription of the names given her; Harvey gave her the heading on a small piece of paper and the book with the names in it; when she had made the lists up with the heading and

the names from the book, she gave the lists to Harvey. Witness further said that her father rented part of his office to Harvey; she wrote out circulars for Harvey to oblige him; Harvey paid her for such work: she was for the purposes of the document his clerk for the time being.

Statement.

No other publication of the alleged libel than that to the witness Ellen Anderson was proved.

The Judge dismissed the action as against all the defendants but Harvey.

No witnesses were called for the defence.

The Judge's charge to the jury was, in part, as follows:—

The plaintiff is this Mr. Harper who was examined before you, and it appears that he has been dealing with a number of people, small grocers apparently, in his neighbourhood, buying groceries from them, for a number of years, and his complaint before you is, that the defendant Mr. Harvey has published a libellous statement about him.

Now, in the first place, I will tell you what a libel is in law. It is any statement made in regard to any person without any proper justification or excuse, the effect of which would be to expose that other person to hatred or to ridicule or to contempt.

It appears that Mr. Harvey is the secretary of an association of the retail grocers of the city of Hamilton, and that their object in having this association is to know with whom it is safe to deal, that is to say, they collect information through the secretary, and he reports to them the names of any persons with whom, according to the information that comes to him as their agent, it is not safe for them to deal. The form in which it is communicated to them is this: a list is prepared of persons in regard to whom reports have come to the secretary from the different members of the association as to the way in which they pay or do not pay, and he makes a list of those who do not pay and sends it to each member of the



Charge.

Street, J.

association, and at the head he says—"The following persons are reported to you, or reported to the association, as being unworthy of credit." . . . So long as reports of that kind are made in good faith and without malice, then there is nothing to be said against them, that is to say, the persons who make them are not liable to be charged in damages for making them, provided they make them in good faith and without malice: that is what is called a privileged communication. Now, what is charged here is, that Mr. Harvey, who was the secretary of this association, sent out such a statement, and that he sent it out maliciously. The evidence of sending it out you have heard. I understand that the plaintiff's counsel relies upon the publication of it to this young lady, who was the typewriter, and who copied out the statement he made. The publication which they assert is a publication to her. It is necessary to shew that it has been published, that is, given out to some person else. If a man writes a libel and puts it in his drawer and locks it up, nobody can complain. It is only when he makes it known to some person else, that it becomes a libel; and the way in which the plaintiff says this particular libel was published was this, that Mr. Harvey, in preparing this list, wrote out the heading, and the heading was such as I have told you—that the following persons have been reported to the association as being unworthy of credit, or something to that effect; the words "unworthy of credit" are the libellous words in it. He wrote this out on a slip of paper, and handed it to her with the list of names in a book that he had prepared, and handed it to his typewriter, and told her to make copies of that. I tell you as a matter of law that, if that was done without malice, the defendants should not be held liable in regard to it, because that was what his duty was as secretary of the association, viz., to mark those persons who were not good pay and send out their names to the different members of the association; and it was

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necessary for him to employ a clerk to make copies of this statement, because they were to be sent to a large number of persons; and what he did was to employ this lady to make these copies, in order that they might be sent out; and if there was no harm in sending them out to the members of the association, then there was no harm in getting this young lady to make them up, if she was employed. He had to employ some one, and it was his duty as secretary to make and send these out, and, if what he did was done without malice, then you should not hold the defendant liable.

[The Judge then defined malice and instructed the jury as to the evidence in regard to malice, and proceeded:]

Now, these are the questions which are before you. First of all, was this a libel in its form, was it a libel? And I tell you, if there were not any case of privilege, that the form of this might be libellous, that is to say, that if one man, without any such object as this association had, were to say of another, write of another, that he was unworthy of credit, that in form might be considered by a jury to be a libellous statement. But here there was this privileged occasion, that is to say, the right that people have who have a common interest in any matter to protect one another against evil consequences arising from it. The object of the association was to protect the members of it from making bad debts or selling to persons who were bad pay, and they had a right to communicate to one another who were persons who were bad pay, providing they did it without malice. Mr. Harvey was communicating to members of the association the names of the persons who were bad pay, and he put it in this form-- "These persons are unworthy of credit." That was a privileged communication unless there was malice. Now, do you find any malice in the defendant in what he did, under the circumstances you have heard? That is the whole simple question.

## Statement.

The jury found that "there was no ground of action," and the Judge entered judgment dismissing the action.

The plaintiff moved to set aside the verdict and judgment and for a new trial, upon the ground of misdirection, and the motion was heard by a Divisional Court composed of BOYD, C., and FERGUSON, J., on the 3rd December, 1900.

Wallace Nesbitt, Q.C., and Gauld, for the plaintiff. The defendant Harvey did not shew that it was his duty to send out this circular. It was certainly publication to the young lady, and there was no privilege as regards her; Harvey had no duty to communicate it to her, and she had no interest to receive it. We refer to *Pullman v. Hill*, [1891] 1 Q.B. 524, which is directly in favour of our contention; *Boxsius v. Goblet*, [1894] 1 Q.B. 842, which is the case of a solicitor and distinguishable; and *Robinson v. Dun* (1897), 24 A.R. 287.

Lynch-Staunton, Q.C., for the defendants, cited *Boxsius v. Goblet*, *supra*; *Lawless v. Anglo-Egyptian Cotton and Oil Co.* (1869), L.R. 4 Q.B. 262; *Baker v. Currick*, [1894] 1 Q.B. 838; *Chamberlain v. Lemay* (1886), 10 O.R. 638; *Nevill v. Fine Arts and General Ins. Co.*, [1895] 2 Q.B. 156; *Huber v. Crookall* (1886), 10 O.R. 475, 485.

Judgment was delivered on the same day.

BOYD, C.:—

We are both of opinion that the judgment should be affirmed. Mr. Justice Street was right in telling the jury that the communication of the matter to the girl was not a publication for which the defendants could be made liable in the absence of malice. The *Lawless* case, cited, shews that there must be some reasonable means of communicating information to persons who have an interest, and that privilege exists in such a case.

The judgment is also sustainable upon another ground, viz., that the verdict of the jury declaring that there was no ground of action was in effect a finding that the words were not defamatory.

The motion will be dismissed with costs.

FERGUSON, J., concurred.

E. B. B.

Judgment.

Boyd, C.

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[DIVISIONAL COURT.]

ONTARIO MINING CO. V. SEYBOLD ET AL.

*Constitutional Law—Indian Lands—Surrender—Treaty—Crown Patent—Precious Metals—Acquiescence.*

The judgment of BOYD, C., 31 O.R. 386, affirmed on appeal.

THIS was an appeal by the plaintiffs from the judgment of BOYD, C., 31 O.R. 386, dismissing with costs an action for a declaration that by virtue of letters patent issued by the Government of the Dominion of Canada to the predecessors in title of the plaintiffs, the latter were entitled to the lands in question, which were part of Sultana island in the Rainy River district, and also to set aside the letters patent issued by the Government of the Province of Ontario to the defendants, and for an injunction and other incidental relief. The facts are stated in the report referred to.

Statement.

The appeal was heard by a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 7th June, 1900.

Robinson, Q.C., Laidlaw, Q.C., and J. Bicknell, for the plaintiffs.

Biggs, Q.C., J. M. Clark, Q.C., R. U. Macpherson, and A. M. Stewart, for the several defendants.

**Statement.**

Shortly after the hearing and before judgment was delivered, ARMOUR, C.J., having been appointed Chief Justice of Ontario, and FALCONBRIDGE, J., Chief Justice of the Queen's Bench in his stead, the parties to the action filed a consent that the judgment of FALCONBRIDGE, C.J., and STREET, J., should be accepted as the judgment of the Court.

December 12, 1900. FALCONBRIDGE, C.J.:—

For the reasons given in the judgment of the learned Chancellor, 31 O.R. 386, which I adopt, I am of the opinion that this case was well decided, and I think the appeal must be dismissed with costs.

STREET, J.:—

The judgment of the Judicial Committee of the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, has plainly decided that under the terms of the British North America Act, sec. 109, the lands in question in the present action became at Confederation the property of the Province of Ontario, subject to the Indian title, as explained and defined in that judgment. It is further explicitly there held that the surrender by the Indians in the Treaty of 1873 had the effect of extinguishing the Indian title, and not of transferring it to the Government of the Dominion.

The plaintiffs in the present action claim title under a patent issued in the year 1888 by the Government of the Dominion of Canada, and the authority of that Government to deal with the land in question is asserted to be derived, under the facts of this case, from the exclusive power reserved to the Dominion Parliament to pass laws relating to "Indians and lands reserved for Indians:" see B. N. A. Act, sec. 91, sub-sec. 24. The state of facts existing in the present case which did not exist in the *St. Catherine's Milling Company Case* is as follows. In 1879

Judgment.  
Street, J.

it appears that certain officers of the Dominion Government set aside the lands in question herein with other lands (being a part of the tract covered by the Treaty of 1873), as a special reserve for the Rat Portage band of Indians. This was done in pursuance of the promise on the part of Her Majesty the Queen, contained in the Treaty, to select and set aside a limited but unascertained portion of the lands affected by the Treaty as a special reserve for the benefit of the Indians who were parties to it. Then, by the Indian Act of the following year, 43 Vict. ch. 28, passed by the Dominion Legislature, provision was made for the surrender by Indians of lands specially held as reserves for them, and for the sale by the Dominion Government, for the benefit of the Indians so surrendering, of the surrendered Reserves. In 1886 the Rat Portage band of Indians accordingly surrendered the portion of land which had been specially set apart for them as above mentioned, and in the year 1888 the Dominion Government sold and conveyed the land now in question to the predecessors in title of the plaintiffs.

The plaintiffs' argument from these facts, and from clause 91 (24) of the B. N. A. Act, then is, that we have a legislative authority given to the Dominion Government, to deal with "lands reserved for Indians;" we have certain lands reserved for Indians; we have an Act of the Dominion Legislature authorizing their sale; and we have a sale in pursuance of that Act, under which the plaintiffs claim title.

The obvious defect in this argument, of course, is, that we are bound to hold, under the judgment of the Privy Council, that, upon the surrender of the Indian title effected by the Treaty of 1873, these lands became the property of the Government of the Province of Ontario, in which they were situate. The surrender was undoubtedly burdened with the obligation imposed by the Treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The

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**Street, J.**

Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it; but it is equally plain that its ownership of the tract of land covered by the Treaty was so complete as to exclude the Government of the Dominion from exercising any power or authority over it. The act of the Dominion officers, therefore, in purporting to select and set aside out of it certain parts as special reserves for Indians entitled under the Treaty, and the act of the Dominion Government afterwards in founding a right to sell these so-called reserves upon the previous acts of their officers, both appear to stand upon no legal foundation whatever. The Dominion Government, in fact, in selling the land in question was not selling "lands reserved for Indians," but was selling lands belonging to the Province of Ontario.

The contention that the Provincial Government must be taken to have assented to the setting aside of these reserves does not appear to be borne out by the facts. An Act of the Provincial Legislature passed in 1891, ch. 3, 54 Vict., sets forth a proposed agreement in which it is expressly declared that the Province was no party to the selection of these reserves and has not concurred therein. Again in April, 1894, the proposed agreement, when executed by the two Governments of the Dominion and the Province, contains the same declaration. There is nothing since that date but controversy between all parties interested—nothing indicating an assent on the part of the Provincial Government to be bound by the action of the Dominion officers in selecting these reserves.

With regard to the claim of the plaintiffs to the right to deal with the precious metals contained in the lands in question, the reasons given by the Chancellor in dealing with that part of the case cover the ground so entirely that it seems unnecessary to do more than to express con-

currence in the reasons as well as in the result to which they lead.

Appeal dismissed with costs.

E. B. B.

Judgment.

Street, J.

## PARKER V. TORONTO MUSICAL PROTECTIVE ASSOCIATION.

*Trade Union—Expulsion of Member—Articles of Association—By-law in Restraint of Trade—Illegality—Militia Act.*

The plaintiff, a musician and a member of the Active Militia of Canada and of the band of a militia regiment, became a member of the defendant association, a body incorporated under the Friendly Societies and Insurance Corporations Act, whose object was "to unite the instrumental portion of the musical profession for the better protection of its interests in general and the establishment of a minimum rate of prices to be charged by members of the said association for their professional services, and the enforcement of good faith and fair dealing between its members, and to assist members in sickness and death." After the plaintiff had become a member, the defendants adopted and added as part of one of their articles of association the following: "No member of this association shall play on any engagement with any person who is playing an instrument, unless such person can shew the card of this association in good standing. This by-law shall not apply to oratorio or symphony concerts, bands doing military duty, or amateurs. . . ." After the passing of this by-law, the plaintiff and the other members of the regimental band to which he belonged played at a concert, in uniform, under the direction of the bandmaster, and with the permission of the commandant and officers of the regiment. For so playing (some of the band not being members of the association) a fine was imposed on the plaintiff by the executive committee of the defendants, and, in consequence of its not being paid within the time prescribed, he was expelled from membership:—

*Held*, that, at the time the plaintiff joined the association, it was a legal society, its objects being of a friendly and provident nature; but the amendment was unreasonable and in restraint of trade, and for that reason, and also because contrary to the Queen's Army Regulations and the Militia Act of Canada, was illegal, and the plaintiff's expulsion was invalid, and he was entitled to an injunction and damages.

*Rigby v. Connol* (1880), 14 Ch.D. 482, *Mineral Water Bottle, etc., Society v. Booth* (1887), 36 Ch.D. 465, *Swaine v. Wilson* (1889), 24 Q.B.D. 252, and *Chamberlain's Wharf, Limited v. Smith*, [1900] 2 Ch. 605, considered.

THIS was an action for an injunction and damages, tried before MACMAHON, J., without a jury, at Toronto, on the 8th October, 1900. The facts are stated in the judgment.

*F. E. Hodgins*, for the plaintiff.

*E. F. B. Johnston*, Q.C., for the defendants.

Statement.



Judgment.

December 18, 1900. MACMAHON, J.:—

MacMahon, J.

The plaintiff is a musician residing in Toronto, and a member of the Active Militia of Canada enrolled under the Militia Act of the Dominion, and of the band of the 48th Highland regiment thereof, and became a member of the defendant association, which is a body incorporated under the Friendly Societies and Insurance Corporations Acts.

A constitution was adopted by the defendants, and by-laws were passed and revised on the 24th April, 1898.

By Article II. of the constitution the objects of the association are set forth as follows :

“The object of this association is to unite the instrumental portion of the musical profession for the better protection of its interests in general and the establishment of a minimum rate of prices to be charged by members of the said association for their professional services, and the enforcement of good faith and fair dealing between its members, and to assist members in sickness and death.”

By Article IV. it is provided that all musicians should be eligible for membership, subject to the by-laws.

The funds of the association are raised by admission fees, monthly dues, and fines, and by such means as the defendants from time to time may determine.

A monthly payment was by the by-laws to be made to the financial secretary at the regular monthly meetings, which were appointed to be held on the first Sunday of each month, and, should the funds of the association fall below the sum of \$500, an assessment of 25 cents per month was to be levied on all members until the fund should reach \$600.

The benefit fund was to be held exclusively for the payment of sick and death benefits due to members of the association.

Members in good standing for six months, if incapable of following their usual occupation by sickness or dis-

ability, were entitled to receive a benefit during such sickness or disability of \$3 per week for eight weeks, and a death benefit of \$25 was payable upon the death of each member in good standing as defined by the by-laws.

Judgment.  
MacMahon, J.

The plaintiff was accepted as a member in 1898, he agreeing to conform to the constitution and by-laws of the association.

On the 1st October, 1899, the defendants adopted and added as part of Article III., sec. 1, the following :

"No member of this association shall play on any engagement with any person who is playing an instrument unless such person can shew the card of this association in good standing. This by-law shall not apply to oratorio or symphony concerts, bands doing military duty, or amateurs. (Amateurs are here defined as persons who do not receive pay for their services.) Any member violating this by-law shall be subject to section 2 of Article VIII."

Article VIII., sec. 2, is as follows :

"A violation of sections 1, 2, 3, and 15 of Article III. (by-laws) shall be considered as a breach of faith, and the offender shall, after a fair and impartial investigation by the executive board, if found guilty, be fined for the first offence \$2, for the second offence \$5, and for the third offence be expelled by the executive board, whose decision shall be final."

Sections 1, 2, 3, and 15 of Article III. are as follows :

"Sec. 1—Any member or members engaging musicians must engage association members only. Members receiving engagements from non-members or members must be governed by the association price list in all cases, and any member who shall have violated this section shall be deemed to have committed a breach of good faith and fair dealing between the members of this society, and shall be punished according to sec. 2, Article VIII."

"Sec. 2—It shall be considered a breach of faith and violation of Article VII. in any member soliciting or in any manner expressing himself to the effect that he desires or

Judgment.

MacMahon, J.

will accept any engagement for less than the stipulated price adopted by the association; and it shall be acceptable proof of the charge to produce a sworn affidavit of non-members to corroborate such charges."

"Sec. 3—It shall be a like offence for a member to offer another member an engagement for less than the price laid down by Article VII."

"Sec. 15—No member of this association shall be allowed to take an engagement for which engagement a member has made a *bond fide* contract or other legitimate arrangement, in accordance with the by-laws, except by permission of such member; or when said member has violated the laws of propriety, fair dealing, or in some way committed himself which would justify his being disengaged. Any member violating this section lays himself liable to such penalties as laid down in Article VIII., section 2, of the by-laws."

By Article IX., sec. 2, any member under suspension for six months is to be expelled from membership.

After the passing of the added by-law of the 1st October, 1899, the plaintiff and the other members of the 48th Highlanders' band played at a concert given at Massey Hall in the city of Toronto, in uniform, under the direction of Mr. Slatter, the bandmaster. The engagements of the band were made with the permission of the commandant and officers of the regiment, and when playing the members are obliged to wear the regimental uniform.

The charge against the plaintiff was that he played at such concert in Massey Hall in conjunction with members of the Highlanders' band who were not members of the association.

The plaintiff had paid his dues up to and inclusive of November, 1899.

On the 25th January, 1900, a fine of \$2 was imposed by the executive committee for violating the provisions of the added by-law, and, in consequence of its not being paid

within the time prescribed, the plaintiff was on the 4th day of February expelled from membership of the association.

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MacMahon, J.

In consequence of his expulsion he lost six engagements, because members of the association refused to play with him. For four of these he would have received, had he played, \$1.25 each night, and for two others \$3 each, making a total of \$11.

When he was notified of the intention of the executive to consider the question of his having violated the by-laws, he attended that meeting and took the position that he was a member of a military band and could not, therefore, be fined under the new by-law. The executive committee, however, as already stated, imposed the fine.

On the 5th February the plaintiff went to Mr. Weatherburn, the treasurer of the association, and offered to pay any fees that were then due, which Mr. Weatherburn refused to accept, or at least said he could only accept on account of the \$2 fine imposed.

The plaintiff asks for a declaration that his suspension was illegal and void, and that he is still a member of the association in good standing and is entitled to the benefits and interested in the funds thereof.

The list of membership of the association which the plaintiff signed contains the signatures of ninety-six musicians.

At the time the plaintiff joined the association it was a perfectly legal society, its objects being of a friendly and provident nature. And it was held in *Swaine v. Wilson* (1889), 24 Q.B.D. 252, that, where a society is of that nature, the fact that some of its rules are illegal as being in restraint of trade does not constitute the society an illegal society, or prevent a member from recovering a sum of money payable to him under a rule of the society which is not illegal; and that where rules are made for the *bond fide* purpose of protecting the funds of such a society from claims, which may be avoided, they are not

Judgment.  
MacMahon, J.

illegal because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable or necessary for that purpose.

The plaintiff in that case sued to recover the sum of £50, to which he claimed to be entitled as a member of the society under its rules. The defence set up was that some of the rules were in restraint of trade, and that the agreement on which the plaintiff was suing was an illegal agreement and brought it within the Trade Union Act of 1871, and the amendments thereto of 1876, and that the Court could not entertain the suit, the claim not being enforceable at law.

But, as pointed out by Lord Esher, M.R., the impugned rules in that case were not passed with the design of restraining trade. He said (p. 257): "But I say further as to this society that I do not think the rules challenged are vicious as being in restraint of trade. I do not think they were intended for that purpose. They were, as it seems to me, intended to be for the purpose of preventing extravagant outlay by the society and of economizing that which the society might have to do for its members: and in my opinion their provisions do not exceed what is reasonable and necessary for that object. Although, if carried into effect, they may to some extent be in restraint of trade, yet, that not being their object, and their provisions being only sufficient for a legal object, I do not think that we ought to extend the doctrine with regard to restraint of trade so far as to hold them illegal as being in restraint of trade."

In *Mineral Water Bottle, etc., Society v. Booth* (1887), 36 Ch. D. 465, the plaintiff society was established for the protection of a particular trade, and the articles of association contained this rule:

"No member of this society shall employ any traveller, carman, or outdoor *employé*, who has left the service of another member, without the consent in writing of his

later employer, until after the expiration of two years from his leaving such service."

Judgment.  
MacMahon, J.

The Court of Appeal held that the rule was unreasonable and in restraint of trade.

So in *Chamberlain's Wharf, Limited v. Smith*, [1900] 2 Ch. 605, the rules of the association, called the Tea Clearing House, the members of which were dock companies and tea warehouse keepers carrying on the business of warehousing tea in bond, provided (rule 11) that every member should charge on teas the respective rates and adhere to the terms and conditions specified in a schedule to the rules, and should not be at liberty to depart from them in any way, except that a discount not exceeding ten per cent. might be allowed on the said rates. No other discount, no money gratuities, and no advantages, direct or indirect, should be offered or allowed by any member to any merchant, broker, or other person in connection with any matter or thing in any wise relating to the Tea Clearing House agreement. By rule 14, no subscriber should be entitled to warehouse or deposit tea with, or employ in connection with tea, any dock company or tea warehouse keeper who was not a member of the Clearing House, or to purchase or sample any tea from the warehouse of any non-member. By rule 15, any member breaking or failing to observe any of the rules was to be liable to expulsion by resolution of the committee. The Court of Appeal held the objects of the association were illegal as being in restraint of trade, independently of the Trade Union Act, 1871 (of which our Act, R.S.C. ch. 131, is a transcript).

In *Chamberlain's Wharf, Limited v. Smith*, [1900] 2 Ch. 605, it was held that *Rigby v. Connol* (1880), 14 Ch. D. 482 (which it followed), is not inconsistent with and has not been impeached by *Swaine v. Wilson*, 24 Q.B.D. 252.

No such purpose was to be subserved in the present case as was being accomplished by the rules to which Lord Esher, M.R., referred as being challenged in *Swaine v. Wilson*, 24 Q.B.D. at p. 257.

Judgment.

MacMahon, J.

Although the plaintiff was at the time he became a member of the association a member of a military band, and known to be such, he is, according to the added by-law, prevented from playing on any engagement as a member of and with such band, even if there was only one member of the band who was not a member of the association. It also restricts bandmasters—if such bands are not to be confined exclusively to military duty—in the choice of musicians to those who are members of the association, or the full complement of the band must be selected from those who have not joined the association. For if one or two musicians were engaged (no matter how skilled they might be) who were not members of the association, the other members of the band who were members of the association could not, under this by-law, play in an engagement without violating it.

It was urged by counsel for the defendants that the restraint imposed by the amended by-law was not unreasonable because the plaintiff was not prevented from playing with the Highlanders' band while doing military duty. But he, as a member of a military band, was governed by the Queen's Army Regulations and the Militia Act, to which he was obliged to conform, and his interests, in so far as doing military duty was concerned, could not be in any manner interfered with, or better protected, by becoming a member of the defendant association. But by the amended by-law he is deprived of a considerable portion of his earnings as a bandsman because prevented from playing in engagements with the Highlanders' band where the band is paid for its services, even should one bandsman not connected with the association play during such engagement. In fact, the association was in passing the amended by-law virtually endeavouring to make it a trades union organization, which the plaintiff never consented to join.

The amendment to the by-laws of the 1st October, 1899, is, I consider, invalid as being unreasonable and in restraint of trade.

As already pointed out, the plaintiff was a member of a military band, and the amended by-law is contrary to the Army regulations, the Militia Act of Canada, R.S.C. ch. 41, and the Canadian Militia Regulations and Orders.

Judgment.  
MacMahon, J.

Section 82 (1) of the Militia Act provides that the Active Militia shall be subject to the Queen's Regulations and Orders for the Army; and every officer and man of the Militia shall, during the period of annual drill, and also at any other time while in the uniform of his corps, be subject to any Army Act passed by the Parliament of the United Kingdom, and all other laws then applicable to Her Majesty's troops in Canada.

The Militia Orders of 1st December, 1898, direct: (No. 5) Bandsmen belonging to corps enlisted for continuous service must wear militia uniform clothing on all occasions, either public or private, in which they may be required or lawfully authorized to take part.

The Queen's Regulations and Orders for the Army issued on 1st July, 1899, provide (No. 972) for establishment in a battalion of infantry of a band composed of one bandmaster, one sergeant, one corporal, and twenty privates, who are to be effective soldiers perfectly drilled and liable to serve in the ranks: and by Order 986, bandmasters are responsible for the command and discipline of their bands, and are to attend all parades with their bands and will accompany and be responsible for them when they play in public places or attend an entertainment.

The plaintiff as a soldier would be violating the Queen's Regulations and the Militia Act were he as a member of the Highlanders' band to refuse to play at an engagement sanctioned by the commanding officers of the regiment, no matter how many of the bandsmen were not members of the defendant association.

The amendment to the by-laws is therefore, so far as the plaintiff is concerned, also illegal, as being contrary to the Queen's Army Regulations and the Militia Act of Canada.



**Judgment.**

MacMahon, J.

The amendment being illegal for the reasons stated, the plaintiff's suspension as a member of the association was invalid; and his name should not have been omitted from the directory of the members of the association printed and published for the defendants before the 4th February, 1900, and circulated by them.

In the circular issued by the defendants and addressed to the trades unions and labor organizations of Toronto, those who had been suspended or expelled are described as having "deserted" the association. The plaintiff had not deserted. He was fined for having violated the amended by-law, and suspended for non-payment of the fine. But he insisted that, as the by-law was illegal, he had not ceased to be a member, and tendered to the treasurer the dues owing the association. The circular asks the co-operation of the members of the trades unions and labour organizations in dealing with these men, which means to prevent them from being employed as musicians because of their desertion of union principles.

The plaintiff had not deserted the association, and the statement that he was a deserter was untrue, and the association acted maliciously in so stigmatizing him. And as to the cause of action founded on the libel, I assess the damages at \$20.

In view of the conclusion reached as to the questions dealt with in the judgment, I have not considered it necessary to deal with the question as to the amended by-law being illegal by reason of its having been passed on a Sunday.

There will be judgment for the plaintiff as to all the causes of action in the statement of claims (other than the cause of action set out in the 26th paragraph thereof) for the sum of \$20, at which I assess the damages; and for the sum of \$20 in respect of the cause of action set forth in the 26th paragraph of the statement of claim. He is

also entitled to a perpetual injunction as asked for in the third clause of the prayer in the statement of claim.

Judgment.

MacMahon, J.

The defendants must pay the plaintiff's costs.

E. B. B.

### RE HOPKINS ESTATE.

*Devolution of Estates Act—Payment of Debts—Distinction between Real and Personal Property—R.S.O. ch. 127.*

The Devolution of Estates Act, R.S.O. ch. 127, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts; but, except in the case of a residuary devise specially provided for by section 7, the order in which different classes of property are applicable to the payment of debts has not been changed by the Act.

THIS was an application by the Toronto General Trusts Co., the executors of Samuel Hopkins, deceased, for an order determining "whether the debts of the deceased should be paid out of the personal estate only or out of the real estate only, or out of both, and if so in what proportions?"

Statement.

The argument took place on October 8th, 1900, before STREET, J., in whose judgment the facts are sufficiently stated.

*W. M. Douglas*, Q.C., for the executor.

*Gibbons*, Q.C., for Mrs. Upthegrove, contended that realty and personalty were one fund for the payment of debts and should contribute rateably: *Scott v. Supple* (1893), 23 O.R. 393; *Re Nixon* (1889), 13 P.R. 314; *Plomley v. Shepherd*, [1891] A.C. 244.\*

\* This case is one on the effect of New South Wales Act, 26 Vict. No. 20, which by secs. 1 and 2, gives all land which previously descended to the heir to the next of kin of the predecessor.—*REP.*

## Argument.

*W. N. Ferguson, Q.C.*, for Fred. Hopkins, contra, contended that the Act only applied to an intestacy and a residuary devise: Williams on Executors, 9th ed., pp. 1561, 1575-8; Article on Devolution of Estates Act, 10 C.L.T. 97; R.S.O. 1897, ch. 127, secs. 4 and 7.

*Middleton*, for the class composed of the children of Mrs. Upthegrove and Ida May Armstrong.

October 11th, 1900. STREET, J.:—

The will of the testator bears date Sept. 1st, 1899, and is as follows:—"I revoke all former wills or other testamentary dispositions by me at any time heretofore made, and declare this only to be and to contain my last will and testament:

"I direct all my just debts, funeral and testamentary expenses to be paid and satisfied by my executor herein-after named, as soon as conveniently may be after my decease:

"I give, devise and bequeath all my real and personal estate of which I may die possessed, in the manner following, that is to say:

"I give and bequeath all my personal property to my sister Mary E. Upthegrove.

"I give, devise and bequeath to my sister my real estate in said village bounded on the north by Charlotte Street, on the east by Clarence Street and on the south by Kent Street, containing four acres, more or less, her heirs and assigns forever.

"I direct my executors to keep my other real estate rented as it is now rented, or on such favourable terms as may be obtained for the period of ten years after my death, and the income arising therefrom I direct my said executor to apply as follows:

"First in the payment of taxes (if any) insurance and repairs. Second, in payment of ten dollars a week during that time to my son Frederick Hopkins, and

ten dollars a year to the caretaker of the cemetery where my tomb is.

“Third, the balance (if any) after payment of these items, to be paid to my adopted daughter Ida May Armstrong, wife of Duncan Armstrong.

“At the end of ten years my said executor is to sell all my said real estate, and out of the proceeds thereof, is to pay one thousand dollars to said Ida May Armstrong, and five hundred dollars to Joanna Story, wife of Crosby Story, of the City of Toronto, and to invest a sufficient portion of the balance of the purchase money to yield an income of ten dollars to my said son Frederick, during his lifetime, and is to invest a further sum sufficient to yield an income of ten dollars to be paid the caretaker for the time being of the cemetery where my tomb is, and the balance is to be divided among Ida May Armstrong and the surviving children of my said sister Mary E. Upthegrove, share and share alike, and on the death of my said son, the principal money so invested for his benefit is to be divided in like manner among the surviving children of my said sister Mary E. Upthegrove, and the said Ida May Armstrong, share and share alike.

“All the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto my said sister Mary E. Upthegrove.

“And I nominate and appoint the Toronto General Trusts Company to be executor of this my last will and testament.

“In witness whereof, etc.”

The personal property is valued at about \$7,000, exclusive of a much larger sum now in litigation.

The debts amount to about \$7,700.

The Devolution of Estates Act, R.S.O. ch. 127, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts, but except in the case of a residuary devise of real and personal estate which is specially provided for by the

Judgment.

Street, J.

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Street, J.

seventh section, the order in which the different classes of property were applicable to the payment of the debts before the passing of the Act does not seem to have been disturbed by its provisions. The personal property of the deceased, in the absence of some express clause in the will to exonerate it, remains therefore the primary fund for the payment of debts. Here there is nothing pointing to any such intention to exonerate, and it must be applied as far as it will go in payment of them. In case of a balance of debts remaining unpaid after all the personal estate has been exhausted recourse must be had to the real estate which is all of one class, that is to say, real estate specifically devised, and each parcel is chargeable in proportion to its value with its proper share of the balance of the unpaid debts, for there is nothing pointing to any intention that one parcel rather than another should first bear the burden.

In the event of a deficiency, unless the parties can agree upon the proportions chargeable against the several parcels and the manner in which the amount to be paid is to be raised, it will be necessary that there should be a reference to ascertain the proper proportions chargeable against the different parcels and the best method of raising it. If the parties can agree, the expense of such a reference and of a sale by the Court may be saved.

The costs of this application of all parties should be paid out of the estate, those of the executors to be taxed as between solicitor and client.

A. H. F. L.

## BROWN V. TORONTO GENERAL TRUSTS CORPORATION.

*Gift—Donatio Mortis Causâ—Bank Deposit Book.*

A banker's pass book, which is numbered, and in which it is stipulated that deposits recorded in it will not be repaid without its production, is a proper subject of *donatio mortis causâ*, and delivery of such a book in anticipation of death operates as a transfer of the debt to take effect upon death.

## Statement.

THE plaintiff brought this action against the above corporation as the administrators of the estate of Benjamin Brown, deceased, whose niece the plaintiff was, for specific performance of an agreement which she alleged she had entered into with the deceased, and that she might be declared absolutely entitled to certain monies lying to the credit of the deceased in the Standard Bank at Brighton, and to certain securities which she alleged had been handed over to her by the deceased as *donationes mortis causâ*, and that the defendants might be ordered to hand over the same to her or account to her for their dealings therewith, and for other relief.

In her statement of claim the plaintiff alleged that in 1864, having by that time become possessed of certain property of her own, she went to reside with Benjamin Brown upon his farm at his request, he being unmarried and in need of the services of a housekeeper, and that at the time she entered into an agreement with Brown that, in consideration of her so going and living with him on his farm and managing his household, and performing such labour and service as she was able to perform, she should in the event of her surviving him, and neither herself or Brown marrying, have all the property owned by Brown at the time she first went to live with him or thereafter acquired by him or through their joint labours and efforts; or that if she should marry, he would pay her for all the work and service she had performed while living with him prior to her marriage. The plaintiff

**Statement.**

alleged that she had faithfully carried out her part of the agreement for the last thirty-six years, and up to the time of the death of her uncle, and had expended her own means and property in acquiring fresh property, which had been taken in the name of the latter, and she claimed to be entitled absolutely to all of the property of her uncle at the time of his decease. She also alleged that shortly before the death of her uncle he had given to her all the monies to his credit at the Standard Bank, together with two promissory notes and a certain mortgage, and had said if he did not recover she could collect the same and keep the proceeds as her own.

The defendants submitted themselves to the order of the Court.

The action was tried at Belleville before BOYD, C., on November 9th, 1900, and the nature of the evidence given sufficiently appears in the judgment.

*Porter*, for plaintiff, contended that there was here a contract for good consideration in regard to the contribution of the plaintiff's property: there was a sort of life partnership; the property was to become hers; it needed no act to vest it in her except death: *Walker v. Boughner* (1889), 18 O.R. 448; *McGugan v. Smith* (1892), 21 S.C.R. 263; there was a good *donatio mortis causa*: *In re Mead*, *Austin v. Mead* (1880), 15 Ch.D. 651; *Payne v. Marshall* (1889), 18 O.R. 488; *O'Brien v. O'Brien* (1882), 4 O.R. 450; *Freeman v. Freeman* (1889), 19 O.R. 141; *Moore v. Moore* (1874), L.R. 18 Eq. 474; *Orr v. Orr* (1871), 31 U.C.R. 13.

*Aylesworth*, Q.C., and *A. L. Colville*, for the defendants, contended there was no sufficient *donatio mortis causa* as to the mortgage and bank draft, and that any such agreement, as alleged, between the parties would be illegal as prohibiting marriage: *Gibb v. Gibb* (1877), 24 Gr. 487; *Smith v. Smith* (1899), 29 O.R. 309,

26 A.R. 397; *Roberts v. Hall* (1882), 1 O.R. 388; *Cross v. Cleary* (1898), 29 O.R. 542. Argument.

November 14th, 1900. BOYD, C. :—

A gift of a banker's deposit note, with the view of giving to the donee the whole sum secured by it, has been held to be a good *donatio mortis causâ*, and though incomplete the Court will interfere to compel the completion of it by the executors: *In re Mead, Austin v. Mead*, 15 Ch.D. 651; *In re Dillon, Duffin v. Duffin* (1890), 44 Ch.D. 76, 81. In this case the deposit is represented by the pass-book "No. 143," and it is stipulated that no deposit will be paid unless upon production of the pass-book (see Regulation No. 3). And it is further provided that the deposits shall carry interest at four per cent. per annum (Regulation No. 5). This contract of deposit is therefore in these essential terms manifested by the contents of the pass-book, and proof and production of the book is requisite for the recovery upon the contract. According to the doctrine of *Moore v. Darton* (1851), 4 DeG. & Sm. at p. 520, this falls within that class of instruments which are good subjects of *donatio mortis causâ*. To adapt the language of Palles, C.B., in *Cassidy v. Belfast Banking Co.* (1887), 22 L.R. Ir. at p. 73: This pass-book was contemporaneous with the debt; it was delivered to the creditor and was essential to the proof of the contract, and further, the production of it was essential before the money could be redemanded. The delivery of such a pass-book of money on deposit in anticipation of death operates as a transfer of the debt to take effect upon death. So far as the law is concerned, the note and mortgage and pass-book were all valid subjects of *donatio mortis causâ*.

Then, upon the evidence I have no doubt as to the truth of what the plaintiff has said as to the delivery of these securities to her a few days before the death of the intestate and in view of his approaching dissolution. She



Judgment.

Boyd, C.

is corroborated by an independent witness and by all the circumstances of the case; for I have no doubt that there was a well defined bargain between her and her uncle when she first went there that they were to combine their resources—to do the best they could to accumulate during their lives, and that the survivor was to have the whole. This, so far at all events as personalty is concerned, is corroborated out of the mouth of many unimpeachable witnesses. Whatever difficulty may attach to the enforcement of such an engagement by parol in the case of land (according to *Maddison v. Alderson* (1883), 8 App. Cas. 467), the like difficulty does not obtain as to personal property whenever the contract is clearly proved.

I regard the act of the deceased in handing over the bulk of his personal estate to the plaintiff as an evidence of his desire to implement the long standing engagement between them as to the survivor, and his last important act was one of justice to his faithful fellow-helper: *In re Mustapha, Mustapha v. Wedlake* (1891), 8 Times L.R. 160, and *In re Taylor, Taylor v. Taylor* (1887), 56 L.J. Ch. 597.

Upon the evidence before me, the personal estate of the deceased amounted to \$7,977 and the land to \$4,900. The value of the personal estate segregated by the act of donation was  $\$6,500 + 900 + 140 = \$7,540$ . This should be specifically set over to the plaintiff by the administrator if anything further is to be done in that regard.

I think the plaintiff is also entitled to receive the rest of the personal estate after deducting the costs of litigation. These, as in *Moore v. Moore* (1874), L.R. 18 Eq. at p. 486, should be borne by the whole estate and as to both litigants, (the defendants', the administrators', costs as between solicitor and client).

A. H. F. L.

## IN RE BROWN, BROWN V. BROWN.

*Will—Charitable Use—Bequest to Poor House—Mortmain—Postponement of Realization—Costs.*

A testator directed his farm to be sold at the expiration of four years and the proceeds paid over to the treasurer of the Bruce County Poor House to be expended in luxuries for the inmates. It appeared that the House of Refuge of the County was generally known as the County Poor House:—

*Held*, that the bequest was a good charitable use within R.S.O. ch. 112.

*Held*, also, that the provision postponing the sale for more than two years contrary to sec. 4 of said Act was invalid, unless the period were extended by the Court or Judge.

As there were no disputed facts and no questions that could not have been raised under Rule 938, costs only of a motion under that rule were allowed.

THIS was an action to have the will, the provisions of which are stated in the judgment, construed, and the legacy in favour of the Bruce County Poor House therein contained, declared void; and was tried before STREET, J., without a jury, at Walkerton, on November 28th, 1900.

Statement.

*Malcomson*, for the plaintiff, contended that the legacy in question was not a charitable use: *Browne v. Yeall* (1791), 7 Ves. 50 n; *In re Bridger, Brompton Hospital for Consumption v. Lewis*, [1893] 1 Ch. 44; *Re McCauley* (1897), 28 O.R. 610.

*Garrow*, Q.C., for the infant defendants, contended that the bequest was illegal, because the testator must be held to have known the law that the land could not be so tied up for four years: *Corbyn v. French* (1799), Tudor's L.C. in Real Prop., 4th ed., p. 639; Jarman on Wills, 5th ed., vol. 1, p. 166; *Loscombe v. Wintringham* (1850), 13 Beav. 87; *Kendall v. Granger* (1842), 5 Beav. 300.

*W. C. Loscombe*, for executors.

*Shaw*, Q.C., for the corporation of Bruce County, referred to *Corporation of Whitby v. Liscombe* (1876), 23 Gr. 1; *Munning v. Robinson* (1898), 29 O.R. 483; *In re Gosling, Gosling v. Smith* (1900), W. N. p. 15.

Judgment. December 15th, 1900. STREET, J.:—

Street, J.

Henry Brown by his will, dated February 21st, 1900, directed his executors to pay his debts and funeral and testamentary expenses, and devised to his executors his farm upon trust to sell it as soon as conveniently might be after his decease and out of the proceeds to pay certain specific legacies, and proceeded thus: "All the balance of proceeds of said sale of my farm, after all previous payments are made, I direct my said executors to pay over to the Bruce County Poor House treasurer to be expended by him for them in luxuries for the inmates of the said poor house in addition to the regular supplies to the said inmates. Provided, however, the lease to George Marshall of the said farm shall be in no ways affected, but said sale shall be made after the expiration of the said lease, four years from the present time. . . . All the residue of my estate, not hereinbefore disposed of, I give, devise, and bequeath unto my executors in trust for purposes herein mentioned."

The testator died on February 27th, 1900, and his executors have proved the will and are parties defendants in this action. The plaintiff is Esther Brown, the widow of the testator; the other defendants are his children, and the corporation of the county of Bruce. The plaintiff asks to have it declared that the legacy to the Poor House is void, as being within the Mortmain Acts, and for uncertainty, and asks to have the will construed.

The defendants, the corporation of the county of Bruce, claim the legacy to the Poor House, asserting that the House of Refuge of the county of Bruce is generally known as, and called in the said county "The Bruce County Poor House," or "The County Poor House," and the parties to the action specially agree in the truth of this assertion.

In my opinion the corporation of the county of Bruce, who administer the House of Refuge, are entitled to the residue of the proceeds of the sale of the land in question

Judgment.  
Street, J.

under the provisions of ch. 112 of the Revised Statutes of Ontario, this being a charitable use within the meaning of that Act. Nor is there anything in the objection that this gift is void as a contravention of the provision in sec. 4, which requires land devised for the benefit of a charitable use to be sold within two years from the death of the testator, notwithstanding anything contained in the will, unless such time is extended by the High Court or a Judge in Chambers. A devise of land for a charitable use is not invalidated by a direction that the land is not to be sold until after the limit of two years fixed by the statute, but such a direction is itself invalid unless the period be extended by the Court or a Judge.

The plaintiff and the executors ask that the construction to be placed upon the clause in the will beginning "All the residue of my estate not hereinbefore disposed of" should be declared by the Court. In my opinion "the purposes herein mentioned" in that clause refer to the previous clause in the will, in which the executors are directed to defray the testator's debts and funeral and testamentary expenses. It was stated at the argument that those purposes would exhaust this residue, but should there be a surplus the executors will hold it in trust for the persons entitled as upon an intestacy.

There were no disputed facts here, and the questions raised might all have been raised by a notice under Rule 938, and the costs of all parties should be taxed as upon a motion under that rule and be paid out of the estate, the undisposed of estate, if any, being first applied in payment of them, and the balance out of the first net proceeds of the sale of the real estate.

A. H. F. L.

## [DIVISIONAL COURT.]

REGINA

v.

THE CORPORATION OF THE CITY OF LONDON.

*Municipal Corporations—Prosecution for Nuisance—Non-Repair of Street  
—Preliminary Inquiry—Prohibition—Indictment.*

Proceedings against the corporation of a city on a charge of neglecting to repair and keep in repair one of its public streets, thereby committing a common nuisance, should be by indictment.

Prohibition granted to restrain a preliminary investigation of such a charge before a police magistrate, and an order nisi to set aside the order granting prohibition refused by a Divisional Court.

**Statement.**

THIS was a motion for a rule nisi to set aside an order of FERGUSON, J.

One William Henry Bartram had laid an information and complaint before Francis Love, a police magistrate for the City of London, charging the corporation of the city with neglecting to repair and keep in repair one of its public streets, thereby committing a common nuisance.

An application was made in Chambers on the 4th of September, 1900, before FERGUSON, J., on behalf of the corporation, for an order for a writ of prohibition directed to the police magistrate to restrain the preliminary investigation or enquiry.

*Shepley, Q.C.*, for the motion, relied upon *Re Chapman and the Corporation of the City of London* (1890), 19 O.R. 33, and *Regina v. The T. Eaton Co., Limited*, (1898), 29 O.R. 591.

*Bartram*, in person, contra, contended that a Judge of the Chancery Division had no jurisdiction to grant prohibition: 28 Vict. ch. 18, sec. 2 (D): that an information might be laid against any person: Crim. Code (1892), sec. 558; and a "person" covers a municipal corporation: sec. 3 (t);

Argument.

*Starcy v. The Chilworth Gunpowder Manf. Co.* (1889), 17 Cox C.C. 55; *Regina v. Bryde* (1890), 17 Cox C.C. 187; *The Mayor, etc., of Southport v. The Burkdale Urban District Council* (1896), 18 Cox C.C. 537; *In re The Queen v. The Toronto Railway Co.* (1898), 30 O.R. 214: that a magistrate has jurisdiction to make a preliminary enquiry in any indictable offence, whether murder or common nuisance; that he could not try the murder and he is not asked to try the common nuisance: that a person charged with murder could not obtain prohibition of a preliminary enquiry, because he could only be tried by indictment; only judicial proceedings can be prohibited: Shortt's Informations, Mandamus, and Prohibition, p. 439; *The Queen v. The Local Government Board* (1882), 10 Q.B.D. at p. 321: that prohibition will not be granted if there is any other sufficient remedy: High's Extraordinary Legal Remedies, 3rd ed., sec. 770.

The learned Judge granted the order for the prohibition.

On October the 8th, 1900, before a Divisional Court composed of BOYD, C., FERGUSON, and ROBERTSON, JJ., Bartram moved for a rule nisi to set aside the order of FERGUSON, J., and relied upon the same arguments and authorities as were used in Chambers.

October 8th, 1900. BOYD, C.:—

The complaint is in respect of an indictable offence, and the proceedings should be by indictment.

It has been held that summary proceedings before a magistrate of a preliminary character are not contemplated or provided for by the Criminal Code: *Re Chapman and The Corporation of the City of London* (1890), 19 O.R. 33, and *Regina v. The T. Eaton Co., Limited* (1898), 29 O.R. 591, approved of in the Divisional Court in *In re The Queen v. Toronto Railway Co.* (1898), 30 O.R. at p. 225.

This last case was not of criminal aspect, but involved

Judgment.

Boyd, C.

merely the breach of a city by-law, which was expressly subject to summary procedure.

I think the rule nisi should not be granted.

FERGUSON and ROBERTSON, JJ., concurred.

G. A. B.

## [DIVISIONAL COURT.]

## CARNAHAN v. ROBERT SIMPSON CO.

*Master and Servant—Injury to Servant—Negligence of Fellow-Servant—Workmen's Compensation Act—Factories Act—Elevator—Mechanical Device.*

The plaintiff was employed as a dressmaker in the defendants' departmental store, and, while descending in their elevator after her day's work was done, was injured by the fall of the elevator.

Apart from a question as to the defective condition or arrangement of the safety appliances in connection with the elevator, the cause of the fall was the failure of the person in charge to properly manage the elevator and to use the brake for the purpose of controlling, and which, but for that failure, would have controlled its movements : —

*Held*, that the defendants were not answerable at common law for such neglect, which was that of the plaintiff's fellow-servant, nor under the Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, for the fellow-servant was not a person having any superintendence intrusted to him, within secs. 2 (1) and 3 (2).

By sec. 20, sub-sec. 1 (d), of the Ontario Factories Act, R.S.O. 1897 ch. 256, in every factory all elevator cabs are to be provided with some suitable mechanical device to be approved by the inspector, whereby the cab will be securely held in the event of accident : —

*Held*, that the defendants' store was a factory within the meaning of the Act, and the onus of proving that the brake and "dogs" in use in connection with the elevator were suitable was upon the defendants ; but it was not necessary for them to shew that the device in its concrete form as part of the elevator had been approved ; it was sufficient that the kind of device used had been approved.

*Held*, also, that, in order to render the employer liable to a civil action, it was incumbent on the plaintiff to make out the causal connection between the omission to provide the statutory safeguards and the injury complained of ; and that she had not done.

Statement.

ACTION brought by Elizabeth Carnahan against the Robert Simpson Company (Limited) to recover damages for injuries sustained by her by reason of the fall of a passenger elevator in the defendants' departmental store in the city of Toronto, on the 26th April, 1899.

The plaintiff was a dressmaker in the employment of the defendants, and was descending, shortly after six o'clock in the evening, from the fourth floor to the ground floor, in one of the elevators in use in the store, when, as alleged by the plaintiff, the fuse burned out by the negligence of the defendants, and the elevator dropped swiftly from the first floor to the bottom, causing the injuries of which the plaintiff complained, namely, nervous disorder, loss of sight by the jar, etc.

The action was tried at Toronto, before FALCONBRIDGE, C.J., and a jury. Only the question of damages was left to the jury, who assessed them at \$1,500. The trial Judge dismissed the action. It was agreed at the trial that, if the Court should consider that there was evidence to go to the jury, a verdict should be entered for the plaintiff.

The plaintiff appealed from the judgment dismissing the action, and her appeal was heard by a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ., on the 1st and 2nd October, 1900.

*Masten*, for the plaintiff. I raise three points: (1) that there was positive evidence of negligence proper to be submitted to the jury; (2) that upon the uncontroverted facts *res ipsa loquitur*; (3) that, upon the proper interpretation of the Factories Act and the Workmen's Compensation for Injuries Act, there was a special obligation upon the defendants with regard to the elevator, giving rise to a cause of action. The action is dismissed, but, by the effect of the agreement made at the trial, the onus of establishing that there was evidence is not upon the plaintiff. The leaving a boy who had only five days' experience of an elevator in charge of it was negligence. The fact that the elevator fell at all is quite sufficient to shew negligence. [Wallace Nesbitt, Q.C., for the defendants, conceded that *res ipsa loquitur* would apply but for the common employment of the plaintiff and the boy.] The boy was not a fellow-workman, because the plaintiff was not at the time



## Argument.

of the occurrence engaged in the defendants' service, it being after six o'clock: *Holness v. Mackay*, [1899] 2 Q.B. 319. There was reasonable evidence of negligence to go to the jury: *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596; *Dublin, Wicklow, and Wexford R. W. Co. v. Slattery* (1878), 3 App. Cas. 1155. There was a breach of a statutory duty as to the condition of the elevator, and that gives a cause of action: The Factories Act, R.S.O. 1897 ch. 256, sec. 2; sec. 20, sub-sec. 1 (d); 62 Vict. (2) ch. 18, sec. 3 (O.); *Black v. Ontario Wheel Co.* (1890), 19 O.R. 578; *Finlay v. Miscampbell* (1890), 20 O.R. 29; *McCloherly v. Gale Manufacturing Co.* (1892), 19 A.R. 117, 122, 124; *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595, 601; *Tooke v. Bergeron* (1897), 27 S.C.R. 567; *Canadian Coloured Cotton Mills Co. v. Kerwin* (1899), 29 S.C.R. 478; *Tompkins v. Brockville Rink Co.* (1899), 31 O.R. 124; *Groves v. Wimborne*, [1898] 2 Q.B. 402.

*Wallace Nesbitt*, Q.C. (*John Greer* with him), for the defendants. As a workwoman the plaintiff may succeed in one of three ways: at common law, under the Workmen's Compensation for Injuries Act, or under the Factories Act. In regard to the common law right, I cannot add to what is said in *Black v. Ontario Wheel Co.*, 19 O.R. 578. The defendants have fulfilled their duty by employing a competent firm to make the elevator, and they shew that it was in the same condition at the time of the occurrence as when put in. There is no liability under the Workmen's Compensation for Injuries Act, because sec. 5 leaves a case of this kind as it was at common law. Then, as to the construction of the elevator and compliance with the Factories Act, we say that the proper appliances were there: but, even if the appliances were insufficient, there is no proof that better or other appliances would have made a difference in this case. I refer to *Ross v. Cross* (1890), 17 A.R. 29; *Black v. Ontario Wheel Co.*, 19 O.R. 578; *Kiddle v. Lovett* (1885), 16 Q.B.D. 605; *Cowans v. Marshall* (1897), 28 S.C.R. at p. 169; *Wood v. Canadian Pacific R. W. Co.* (1899), 6 Brit. Col. L.R. 561.

After the argument the Court gave permission to the respondents to adduce some further evidence; and this evidence was heard by MEREDITH, C.J., and ROSE, J., on the 15th November, 1900, the same counsel appearing, and further argument being also heard.

Statement.

December 24, 1900. MEREDITH, C.J.:—

The action is brought to recover damages for injuries sustained by the appellant through the falling of an elevator in the premises of the respondents (in whose employment she was) while she was being conveyed in it from an upper storey, in which her duties were performed, to the ground floor, in order that she might leave the premises, her day's work having been done.

At the close of the whole case a motion was made by the counsel for the respondents to dismiss the action, upon the ground that there was no evidence upon which the jury could reasonably find in favour of the plaintiff, and it was, after some discussion, finally agreed that the jury should make a contingent assessment of the damages and that the action should be dismissed, but that, if an appellate Court should be of opinion that there was any evidence to go to the jury, the judgment pronounced at the trial should be reversed and judgment be entered for the plaintiff for the damages so assessed by the jury.

The jury having assessed the damages at \$1,500, the action was, in accordance with this arrangement, dismissed with costs, and the appellant now appeals in order to obtain a reversal of this judgment and the substitution for it of a judgment in her favour for the sum at which the damages were assessed.

The appellant in her amended statement of claim bases her cause of action upon the common law, the Workmen's Compensation for Injuries Act, and the Ontario Factories Act; and the allegation of the pleading is, that the accident happened "through the negligence of the defendants or

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Meredith, C.J. their servants in the handling of the said elevator, and through the negligence of the defendants in not keeping a properly constructed elevator and not keeping the said elevator in a proper state of repair," by reason of which "the said elevator was permitted to fall to the basement floor, a distance of about thirty feet."

It is also alleged in the statement of claim that the respondents "knew or ought to have known of the defective and unsafe and insecure condition of their said elevator and its appurtenances and attachments;" that the appellant was unaware of it; and that it was owing to the negligence of the respondents that the elevator was not put into a safe and secure condition.

The appellant's allegation as to the cause of the accident is contained in paragraph 8 of the amended statement of claim as follows:

"8. The said accident arose from one or more of the following causes: (a) by reason of a defect or defects in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in the business of the defendants; (b) by reason of the negligence of a person in the service of the defendants, who was intrusted with the superintendence of the elevator which fell as above described, and who was at the time of the accident exercising such superintendence; (c) or by reason of the negligent failure of the defendants to provide the elevator in question with some suitable mechanical device whereby the elevator would be securely held in the event of accident."

Particulars of the negligence charged were delivered by the appellant. They are as follows:

"1. The defendants, through their officers, servants, and agents, whose duty it was to oversee, inspect, alter, manage, and control the elevator and its appointments, connections, machinery, and motive power, negligently failed to apply the brake to the elevator when needed, and negligently turned on the current in an improper manner so as to burn

out the electrical conductors, and negligently permitted the said elevator to be overloaded, and negligently endeavoured too suddenly to stop and to reverse said elevator, and negligently ran the said elevator too fast, and negligently failed to exercise the care and skill necessary to the safe and proper conduct of an electrical elevator.

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"2. The defendants were guilty of negligence in providing and using elevators not equipped with proper safety appliances, and in failing to keep the safety appliances provided in proper working order, and properly adjusted, so that they will operate in case of accident."

"The plaintiff reserves the right to deliver other and further particulars."

It will be observed that neither the amended statement of claim nor the particulars put forward, as a ground of complaint, negligence of the respondents in intrusting the operation of the elevator to a person who was not competent to perform the duty committed to his charge, though that ground was presented in argument before us.

It is, in my opinion, not important to consider whether this ground of complaint is now open to the appellant, because there was no evidence given at the trial which would warrant a finding in favour of the appellant based upon it.

Apart from the question as to the alleged defective condition or arrangement of the safety appliances, to which I shall afterwards refer, it is clear that the cause of the accident was the failure of the young man in charge of the elevator to properly manage it and to use the brake, an appliance with which it was equipped for the purpose of controlling its movements, and which, but for that failure, would have controlled its movements; and for that the respondents are not answerable to the appellant at common law, the neglect being that of her fellow-servant, or under the Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, he not being a person having any superintendence intrusted to him, within the meaning of the Act, sec. 2 (1), sec. 3 (2).

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But it was urged by the appellant's counsel that inasmuch as the respondents had not, as he contended they had not, proved that they had conformed to the provisions of sub-sec. 1 (d) of sec. 20 of the Ontario Factories Act, R.S.O. 1897 ch. 256, their premises, which were a factory within the meaning of the Act, must be deemed to have been kept unlawfully, and so that the safety of persons employed therein was endangered within the meaning of sec. 20.

The provision relied on is that in every factory—" (d) All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device to be approved by the inspector, whereby the cab or car will be securely held in the event of accident to the shipper, rope or hoisting machinery, or from any similar cause."

" (2) A factory in which there is a contravention of this section or of the regulations made for the enforcement of this section, shall be deemed to be kept unlawfully, and so that the safety of any person employed therein is endangered."

There was, apart from the question as to the condition or arrangement of the safety appliance called "the dogs," no evidence whatever to shew that the elevator was otherwise than a good one and in good repair, but, on the contrary, it was shewn affirmatively that it was of the most modern design, well made, efficient for the purpose for which it was designed and used, and in good running order and repair.

It was not, however, proved at the trial that the mechanical device for holding the car or cab securely, whether it be the brake or the dogs, had been approved by the inspector.

The onus of proving this was, no doubt, on the respondents (62 Vict. (2) ch. 18, sec. 3 (a)), and we permitted the respondents to give evidence before us to supply what had been omitted to be proved at the trial in this regard.

The evidence so given shewed that there had been no examination by the inspector of the elevator in question before the accident happened, but that he had since seen and examined it, and that it was of the pattern and supplied with the kind of device of which he had approved in other cases, and which he had determined to be a suitable and proper one to be used.

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This evidence, in my opinion, establishes the requisite approval of the device which the statute demands. I do not think that, as was contended, what is required is the approval of the device in its concrete form as part of the elevator, but, as I have said, the approval of the kind of device used. Had similar language been used as to the device to be used by a railway company for coupling its cars, the approval by the inspector of the well-known Miller coupler by that name would, in my opinion, be a sufficient compliance with the statute, and I do not see why, if that be so, the approval of the device adopted in the Fensom elevator, a well-known form of elevator, should not be held to be a sufficient compliance with the provisions of the statute which I am considering, when, as in this case, such an elevator is used.

But, assuming that the device was not approved by the inspector within the meaning of the Act, and that the respondents' factory is, therefore, to be deemed to have been kept unlawfully and so that the safety of some person employed therein was endangered, are the respondents liable for all the consequences which have arisen while the elevator was in use?

In my opinion they are not.

Section 19 makes it an offence "to keep a factory so that the safety of any person employed therein is endangered . . ."; and the effect of sub-sec. 2 of sec. 20 would appear to be to make the non-compliance with the provisions of sub-sec. 1 either *prima facie* or conclusive evidence (that depending on the meaning to be given to the word "deemed") of the offence under sec. 19; but, in

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my opinion, in order to render the employer liable to a civil action such as this, it is incumbent on the plaintiff to make out the causal connection between the omission to provide the statutory safeguards and the injury complained of. That this must be so is obvious, I think, from a consideration of the provisions of sub.-sec. 1, for, if it were otherwise, a person injured by machinery guarded as the statute requires would be entitled to recover because an elevator in the factory which had nothing whatever to do with the happening of the accident was not provided with the mechanical device mentioned in clause (d); and it would also necessarily follow that, although the elevator was in every respect, including the mechanical device for securely holding the cab or car in the event of accident, the best and most efficient known to science, the employer would be answerable for any injury sustained by an employee while using the elevator.

Apart from the approval of the inspector not having been obtained, assuming it not to have been obtained, it appears to me that the requirements of sub.-sec. 1 (d) were shewn, upon the undisputed evidence, to have been complied with; for I take it the brake with which the elevator was supplied, and which was operated by the young man in charge of the elevator, was a "suitable mechanical device . . . whereby the cab or car will be securely held in the event of accident to the shipper, rope or hoisting machinery, or from any similar cause." The brake answers this description better than do the dogs, for the former was designed to enable the cab or car to be brought to a stand-still at the will of the person in charge, while the latter device, though it was designed to act automatically, was intended only to check the speed of the cab or car in descending if and when the rate of speed—for which the elevator was adjusted—should be exceeded by more than fifty feet per minute.

But granting that this is not the correct view, and that the dogs are the mechanical device which the statute

requires, was there any evidence either (1) that they were not properly adjusted, or (2) that if they had been properly adjusted the cab or car would not have descended as rapidly as it did descend? On the first point, the evidence was very slight, though possibly sufficient to entitle the appellant to have had it submitted to the jury; but upon the second there was, in my opinion, no such evidence. The speed for which the elevator was adjusted was 250 feet per minute, and the device was not intended to act until that speed was exceeded by fifty feet, and there was no evidence whatever as to the rate of speed at which the car was moving at the time of the accident. I say no evidence whatever, because I do not think that, from the general and somewhat exaggerated statement of the appellant as to the rapidity of the movement of the car, it could have been reasonably inferred that the rate of 300 feet per minute was exceeded, nor do I think that any such inference could reasonably be drawn from the fact that the rods were bent. It is true that the witness Russell \* said that considerable violence would be necessary to cause this bending, but how much he did not say, nor did he or any other witness venture the opinion that it might not have been due to the elevator descending at the rate for which it was adjusted.

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Meredith, C.J.

Dealing with an argument similar to that advanced on behalf of the appellant in this case, Mr. Justice Willes in *Daniel v. Metropolitan R.W. Co.* (1868), 3 C.P. at p. 222, said: "I agree entirely with the counsel for the defendants that it is not enough for the plaintiff to shew that there has been an accident upon their line, and thence to argue that therefore the company are liable even *prima facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might or ought to have resorted to; and I go further, and

\* An expert witness called by plaintiff.



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Meredith, C.J.

say that the plaintiff should also shew with reasonable certainty what particular precaution should have been taken."

That I take to be a correct statement of the law, and the result is, that, in my opinion, the appellant's case failed, because the proximate cause of the accident was the omission of the person who was operating the elevator properly to apply the brake, for which omission the respondents are not, for the reason I have already stated, answerable, and because there was no evidence from which it might reasonably have been found by the 'jury that the consequences of that omission would have been avoided had the dogs been in proper working order, or, in other words, that the appellant's injuries were caused by the defective condition of the dogs.

The judgment appealed from must, therefore, be affirmed and the appeal from it dismissed, with costs.

ROSE, J. :—

The accident happened, according to the theory of the plaintiff's witnesses, by the carelessness or negligence of Harrington, who had charge of the elevator, and who, failing to bring the elevator to a stop before turning on the up-current, caused the fuse to be burned out and the car to descend rapidly, and he again failed in proper management of the elevator by not holding the brake so as to "catch the centre," which would have stopped the car.

The elevator was provided with two brakes, one to be operated by the person in charge, the other to act automatically when the descending motion had reached the rapidity of, say, 250 or 275 feet a minute. The automatic brake did not act, either because of some defect in its construction which prevented it from acting until a speed of, say, 350 feet a minute was reached, or because the car did not reach the speed at which it was set to act, say, 250 to 275 feet a minute.

The brake which was to be operated by the person in charge was, I think, clearly a suitable mechanical device, within the meaning of sub-sec. 1 (*d*) of sec. 20 of the Ontario Factories Act, ch. 256, R.S.O. 1897, and it was approved by the inspector within the meaning of such sub-section, and was a device whereby the cab or car would have been securely held in the event of accident to the shipper, rope, or hoisting machinery, or from any similar cause, if the person in charge had not failed to do his duty. By providing such device I think that the defendant had complied with the requirements of the Factories Act. The device had been approved by the inspector, although this particular brake had not been seen or inspected. This was an approval, I think, within the meaning of such sub-section.

The accident, therefore, was the result of the negligence of the person in charge, and it is clear upon the evidence that he was not a superintendent within the meaning of sec. 3, sub-sec. 2, of the Workmen's Compensation for Injuries Act, ch. 160, R.S.O. 1897; nor was he a person so unskilled as to lay the defendant open to the charge of negligence in employing him in such duty.

There was, therefore, no evidence, it seems to me, to go to the jury of negligence under either ch. 256 or ch. 160.

Then was there any evidence of negligence at common law?

Assume that it be held in the plaintiff's favour that the automatic device was one which the defendant might reasonably be required to provide, in addition to the brake over which the person in charge had control, so that the neglect to provide such an automatic device would be evidence of negligence, it still would remain for the plaintiff to shew that if such device had been provided it would have prevented the accident.

The machinery was set so that the car might descend at the rate of 275 feet a minute without any interference by the automatic device, so that unless such speed were

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reached the brake would not act; and upon the evidence it is clear that the lowest speed at which the automatic brake could be reasonably required to act would be 250 feet a minute. It would be impossible upon this evidence to submit to the jury the question of the speed at which the elevator was descending at the time of the accident. It does not appear. The plaintiff, therefore, has failed to shew that, if the defendant had the automatic brake in such a condition that it would have acted at a speed of, say, 250 feet a minute, the car reached such a speed, and so has failed to shew that the supplying of such a brake would have prevented the accident. The evidence, in my opinion, points to a lower speed than 250 feet a minute.

The defendant is in no worse position than if no automatic brake at all had been supplied.

I think, therefore, that neither under the statutes invoked nor at common law was there any case to be submitted to the jury, and that the judgment of nonsuit was right. This appeal, therefore, fails, and must be dismissed with costs.

MACMAHON, J., took no part in the judgment.

E. B. B.

## [DIVISIONAL COURT.]

THE STANLEY PIANO COMPANY OF TORONTO

V.

THOMSON ET AL.

*Evidence—Right to Contradict One's Own Witness—Facts Material to the Issue—Judges leave—Refusal.*

Where a witness (whether party to the action or not) is called to prove a case and his evidence disproves it, the party calling him may yet establish his case by other witnesses, called not to discredit the former, but to contradict him on facts material to the issue; and the right to contradict by such other evidence exists without leave of the Judge at the trial.

Judgment of MACMAHON, J., reversed.

THIS was an appeal from a judgment of MACMAHON, J., in an action brought to restrain the defendants from manufacturing pianos from a scale or patterns belonging to the plaintiffs, and for a return of the scale and patterns to the plaintiffs.

Statement.

The action was tried at Toronto on April 17, 1900, before MACMAHON, J., without a jury.

*Shepley, Q.C., and Vandervoort, for plaintiffs.*

*Watson, Q.C., and Smoke, for defendant Thomson.*

*Bicknell, and J. W. Bain, for defendants Marcy & Co.*

At the opening of the case *Shepley* for the plaintiffs read from the depositions of the defendant Thomson, taken on a motion for an interim injunction, certain questions and answers in which he swore that he had drawn a scale from a piano manufactured by the plaintiffs and had made his patterns from that scale.

It was admitted that he had the right to do that as the scale and patterns were not patented or copyrighted, and if that was the way in which they were obtained the plaintiffs could not succeed; but plaintiffs' counsel proposed to shew in this action that the defendants were manu-

**Statement.** facturing pianos similar to the plaintiff's which only could be done from their (the plaintiff's) own scale and patterns, a set of which had disappeared from their workshop, where defendant Thomson had been previously working: and in order to do that tendered evidence that it was impossible to make the scale and patterns in the manner in which Thomson testified in his depositions he had done.

*Watson* objected to the reception of such evidence as being in contradiction of plaintiffs' own witness, contending that the reading of the depositions was the same as if that defendant had been put into the witness box.

*Shepley* contended that the depositions did not prove that the witness had done the work as he testified, but only that he said he had; and that by reading the depositions of the defendant he was not precluded from shewing that those depositions were untrue.

The learned Judge refused to receive the evidence, and refused to allow the plaintiffs to treat the depositions as the evidence of an adverse witness.

From this judgment the plaintiffs appealed to a Divisional Court, and the appeal was argued on the 8th October, 1900, before BOYD, C., FERGUSON and ROBERTSON, JJ.

*Shepley*, Q.C., for the appeal. The depositions were merely read as admissions. The statements of the defendant could be proved that way as well as by calling a witness to prove he heard them made. The plaintiffs had the right to shew his statements were impossible, and in doing so, were tendering evidence on the issue, which was their proper course and did not bring them within the statute. The plaintiffs were not bound by the statements of the witness, so that they could not be shewn to be untrue. I refer to R.S.O. ch. 73, sec. 20; *Greenough v. Eccles* (1859), 5 C.B.N.S. 786 at p. 802; Taylor on Evidence, 9th ed., p. 938, note 11; p. 939, note 2; Greenleaf on Evidence,

15th ed., sec. 443, note 2; Roscoe's Law of Evidence, 16th ed., 173; Stephen's Dig. of the Law of Evidence, 5th ed., 211, 212; *Melhuish v. Collier* (1850), 15 Q.B. 878. Argument.

*Watson*, Q.C., for the defendant Thomson, contra. The plaintiffs were not taken by surprise. The witness whose depositions were read was not a necessary witness, and so this action differs from fraudulent conveyance actions, and the plaintiffs were not forced to use the depositions. The whole question is: Did the defendant Thomson copy from the manufactured piano, which is not objected to, or did he copy from the plaintiffs' scale, which is objected to. The depositions proved that he copied from the piano, and as that cannot be contradicted as the plaintiffs propose, they must fail. The English cases were decided on the English statute, the object of which was to give the trial Judge power and control. No objection was made to other evidence given at the trial until it contradicted the depositions already put in. The leave of the Judge to treat the witness as adverse was refused and this Court will not review his discretion. I refer to *Price v. Manning* (1889), 42 Ch. D. 372; *Rice v. Howard* (1886), 16 Q.B.D. 681; Phipson on Evidence, 2nd ed., 474, 475; Powell on Evidence, 7th ed., 428; *Scott v. Sampson* (1882), 8 Q.B.D. 491; *Coles v. Coles* (1866), 1 P. & D. 70.

*Bicknell* for the defendants Marcy & Co. No evidence was given against the other defendants and so the action was properly dismissed against them.

*Shepley*, in reply, referred to *Robinson v. Reynolds* (1864), 23 U.C.R. 560.

December 1, 1900. BOYD, C. :—

Though one called as a witness (party or not) may disprove the case of the plaintiff calling him, yet that case may be established by other witnesses called, not to discredit the first, but to contradict him on facts material to

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the issue. This proposition was regarded as settled law of long standing prior to the statute on the subject passed in England in 1854 (C.L.P. Act, sec. 22). It was one of the many rules of evidence which have grown up as the result of practice, so as to become the law of the land. Unless explicitly altered by legislation, these rules are to be regarded as not affected or curtailed by permissive statutory enactment. Such a statute is to be construed as cumulative rather than as destructive.

This rule was common to law and equity. Some few references will manifest this. The head note of *Price v. Lytton* (1827), 3 Russ. 206, is that a plaintiff may read evidence to disprove an allegation contained in a passage of the defendant's answer which he has read. The Master of the Rolls proceeded by analogy to the practice at law which permitted a party to disprove a circumstance that had been stated by his own witness.

The rule at law is very concisely stated by Littledale, J., in *Ewer v. Ambrose* (1825), 3 B. & C. at p. 751, in these words: "Where a witness is called by a party to prove his case, and he disproves that case, I think the party is still at liberty to prove his case by other witnesses." In a note to this case is cited Buller, N.P., thus:—"If a witness proves *facts in a cause* which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are *evidence in the cause*, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only." So again, it was held in *Friedlander v. The London Ass. Co.*, (1832), 4 B. & Ad. at p. 195 that though a party cannot discredit his own witness, he may contradict him upon facts material to the controversy.

This rule was observed and followed also in this country before the English enactment was adopted in Ontario (C.S.U.C. ch. 22, sec. 214) as will appear in *McNab v. Stinson* (1842), 6 O.S. 445, and *Mair v. Curly* (1852), 10 U.C.R.

321, and after the statute in *Roberts v. Reynolds* (1864), 23 U.C.R. 560.

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The object of the introduction of the enactment is a good deal discussed in *Greenough v. Eccles* (1859), 5 C.B.N.S. 786, and it was commented on as an ill-drawn provision. It was not construed as changing the law in respect of the old right to contradict, and in ordinary practice that rule has been constantly acted upon, apart from or independent of the statute. I may extract some passages from the opinion of Mr. Justice Williams:

"It is impossible to suppose the legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue—a right not only fully established by authority, but founded on the plainest good sense. . . . The preferable construction is, that, in case the witness shall, in the opinion of the judge, prove 'hostile,' the party producing him may not only contradict him by other witnesses, as he might heretofore have done, and may still do, if the witness is unfavourable, but may also, by leave of the judge, prove that he has made inconsistent statements," pp. 803, 804, *per* Williams, J. And earlier in the case he said:—"There is evidently some blunder in the section. In all probability it was intended to be read thus: 'but he may contradict him by other evidence, or, in case the witness shall, in the opinion of the judge, prove adverse, by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony,'" p. 794.

Notwithstanding the statute, it is laid down in the text books and recognized in practice—as well as in *Greenough v. Eccles*—that the right to contradict by other evidence exists though the judge may not grant his permission: Stephen's Dig. of the Law of Evidence, 5th ed., pp. 211, 212; Taylor on Evidence, 9th ed., p. 938, and note 2, p. 939; Roscoe's Law of Evidence, 16th ed., p. 173; Roscoe's Criminal Evidence, 12th ed., p. 91, and Phipson's Law of Evidence, 2nd ed., p. 475.



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Boyd, C.

That is to say, the statute is construed as not to interfere with the previously existing right established to arrive at the truth. See *Northard v. Pepper* (1864), 10 Jur. N.S., at p. 1078, *per Erle, C.J.*

In this case the plaintiff read from the depositions of the defendant evidence to shew that it was practicable to make the scale of a piano with no other guide than the piano itself—that being the ground of the defence—with the view afterwards of contradicting this by the plaintiff's own witnesses. The plaintiff thus proposed to give, on his side, the case of the defendant, and controvert it by his own evidence—which he might have done without dispute had he first called his own witnesses and then read the defendant's depositions. Reversing the order cannot be allowed to interfere with the plaintiff's right to have his case heard, and have it presented in his own way—unless peradventure he acts vexatiously and unreasonably.

I think the case should go down again for trial, and the costs of this appeal to be costs in the cause.

FERGUSON, J.:—

The plaintiffs are manufacturers of pianos, and at one time had in their employment the defendant Thomson.

The plaintiffs say that during their employment of the defendant Thomson, they were the owners of a certain piano scale known as scale No. 10, being the original scale according to which a certain piano manufactured by the plaintiffs and known as scale No. 10 style A. was constructed and built; and were also the owners of duplicate patterns, constructed from such scale: that such scale was and is of great value, because, among other reasons, patterns of the said piano can only be produced by means of such scale, which, though not protected by patent or copyright, was a trade secret known only to those in the employment of the plaintiffs.

They say that the defendant Thomson at the time he ceased to be in the service of the plaintiffs, or subse-

quently conceived the scheme of fraudulently appropriating to his own purposes the said trade secret, and took away and converted to his own use the said scale and one of the duplicate sets of piano patterns constructed therefrom: that the defendants, A. Marcy & Co., after Thomson had ceased to be in plaintiffs' employment, embarked in the business of manufacturing pianos, and by some arrangement with Thomson, it was agreed that he should manufacture for his co-defendants, Marcy & Co., a piano to be called "The Marcy Piano," which it was understood and agreed between the defendants must be an exact imitation of the said scale No. 10 style A. piano manufactured by the plaintiffs.

Judgment.

Ferguson, J.

They allege that Thomson accordingly constructed certain patterns from the original scale, which he so converted to his own use or from the patterns which he so converted or partly from the scale and partly from the patterns, and that from the patterns so constructed by Thomson, the defendants were manufacturing and putting upon the market pianos which were an imitation of the said scale No. 10 style A. piano.

The defendants in their pleading deny the charges made by the plaintiffs.

Though the plaintiffs claimed that their scale was a trade secret it was conceded that there was nothing to prevent any one from manufacturing a piano like, or an imitation of, the plaintiffs' piano if he could do so without using this scale or this pattern, for instance, by copying their manufactured article.

At the trial counsel for the plaintiffs read from the examination of the defendant Thomson taken on the motion for an injunction. These were received as admissions receivable as against the defendant who made them. There was, as I understand, no examination for discovery.

The examination so read, if taken to be true, shewed, as I understand and as appears to have been assumed by counsel and the learned Judge at the trial, that Thomson

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Ferguson, J.

had copied one of the pianos that had been manufactured and sold by the plaintiffs as scale No. 10 style A piano, without using the plaintiffs' scale or patterns at all.

The plaintiffs then sought to give evidence of skilled witnesses to shew that this was not possible and that as a consequence the statements made by Thomson in his examination that had been read by plaintiffs' counsel could not be true. This was objected to on the ground that unless by leave of the presiding Judge the plaintiffs could not contradict the evidence adduced by them, namely, the statement read from the examination of Thomson.

Plaintiffs' counsel contended that he had the right to give evidence relevant to the issue even though such evidence in effect should contradict the statements of Thomson that he had read. The learned Judge having ruled against him on this contention, he then asked that the discretion of the learned Judge should be exercised in his favour and that he be permitted to give the evidence offered. This was also refused.

It is not contended here that the exercise of discretion by the trial Judge is not final. The authorities seem to shew that it is final.

The question here is, as to whether or not the plaintiffs had the right to give the evidence, it being conceded that it was relevant to the issue, without any leave of the learned Judge so to do.

On the argument before us counsel for the defence relied upon the cases *Price v. Manning* (1889), 42 Ch. D. 372 and *Rice v. Howard* (1886), 16 Q.B.D. 681. I have the misfortune to think that neither of these cases is in point at all. Each of them seems to be upon another subject.

The same counsel also referred to Phipson's Law of Evidence, 2nd ed. p. 475, in support of his contention. There, however, the learned author, after some discussion upon statutes in *pari materia* with our cap. 73, sec. 20, says: "Yet, in spite of these statutes, a party may, as of

right, without obtaining such opinion or leave, contradict his own witness, whether adverse in the above sense or not, by *other evidence* relevant to the issue, and thus *indirectly discredit him.*"

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Ferguson. J.

In Stephens' Dig. of the Law of Evidence, 5th ed. at p. 211, the learned author says: "The words 'he may, in case the witness shall, in the opinion of the Judge, prove adverse, contradict him by other evidence,' suggest that he cannot do so unless the Judge is of that opinion. This is not, and never was, the law," and reference is there made to the case *Greenough v. Eccles* (1859), 5 C.B.N.S. 802, where Mr Justice Williams said: "The law was clear, that you could not discredit your own witness by general evidence of bad character, but you might nevertheless contradict him by other evidence relevant to the issue," and the learned Judge adds: "It is impossible to suppose the legislature could really have intended to impose any fetter whatever on the rights of a party to contradict his own witness by other evidence relevant to the issue,—a right not only fully established by authority, but founded on the plainest good sense": p. 803.

In Taylor on Evidence, 9th ed., in a note at p. 939, the same view is adopted, and in Greenleaf on Evidence, 16th ed., at sec. 443, the same proposition is stated.

It seems to me that the plaintiff had the right without any ruling or leave of the trial Judge to go on and give his evidence, though such evidence being, as it was, relevant to the issue, should contradict the evidence already given by him, and even though it would incidentally have the effect of discrediting his former witness. What the plaintiff wanted to do was simply to give more relevant evidence. I am of the opinion that the law entitled him to do this, and I have not found any decision that I think forbids his so doing.

An effort seems to have been made by plaintiff's counsel to shew that his position was better than if he had

**Judgment.** actually called Thomson at the trial. I do not think that  
**Ferguson, J.** he need have made this effort.

The case has manifestly not been tried out to the end. I think the ruling of the learned Judge was erroneous, and that there should be a new trial, the costs here and of the trial to abide the event, costs in the cause.

ROBERTSON, J., concurred in the judgment of the Chancellor.

G. A. B.

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[DIVISIONAL COURT.]

RITTER V. FAIRFIELD.

*Judgment—Foreign Judgment—Warrant of Attorney—Confession—Jurisdiction.*

The general rule is that a judgment valid by the laws and practice of the state where it is rendered or confessed may be sued upon as a ground of action in any other state.

A judgment by confession is an instance of a party voluntarily submitting himself to the jurisdiction of the Court whereby competence is acquired to deal with the matter submitted :—

*Held*, that a judgment recovered in the State of Pennsylvania, after the defendant had ceased to reside in that State, upon a warrant of attorney in favour of any attorney of a Court of Record, executed while the defendant was a resident of the State, was valid, and that the courts there had jurisdiction to deal with the matter, and over the person of the defendant.

Judgment of MACMAHON, J., affirmed.

**Statement.** THIS was an appeal from the judgment of MACMAHON, J., in an action brought on a foreign judgment, which was tried, without a jury, at Kingston on the 19th of June, 1900.

*E. H. Smythe, Q.C.*, for the plaintiff.

*D. H. Preston, Q.C.*, for the defendant.

The exemplification of the judgment recovered on a note and warrant of attorney in the Court of Common Pleas, of Venango County, State of Pennsylvania, was

put in and evidence given as to the effect of giving such note and warrant of attorney in that State.

Statement.

At the close of the evidence the following judgment was delivered :—

MACMAHON, J.:—

I do not think it is necessary to call on Dr. Smythe. While the defendant was a resident of the United States and living in Colorado, he became a citizen of the United States; and after his return from Colorado to Pennsylvania, and while he was domiciled there, his wife and family living with him, he carried on business at Petroleum Centre in that State, he made the obligation that is sued upon in this action for a debt then owing to the plaintiff; the promissory note being for thirteen hundred and some odd dollars, and payable with interest thereon.

Appended to the note is a warrant of attorney signed by the defendant opposite the letters L.S., which, according to the evidence of Mr. Osmer, an attorney at law for the State of Pennsylvania, makes it a contract under seal, and is a common and usual obligation, particularly in that part of the State where the note was made and the warrant of attorney executed, where the business carried on is principally in connection with oil and lumber transactions; and he also says that the document is a usual obligation taken by the banks there. The warrant of attorney, he says, does not require—as is required in this country—to be signed in the presence of an attorney appointed by the person giving it. The power is extremely wide. The defendant promises to pay the note with interest; and then this is the warrant:

“And further I do hereby authorize and empower any attorney of any Court of Record in Pennsylvania or elsewhere to appear for and to enter judgment against me for the above sum, with or without declaration, with costs of suit, release of errors, without any stay of execution, and with five per cent. added for collecting fees; and I also waive the right of inquisi-

Judgment.

MacMahon, J.

tion on any real estate that may be levied upon to collect this note, and do hereby voluntary condemn the same, and authorize the prothonotary to enter upon the *fi fa* said voluntary condemnation, and I further agree that the said real estate may be sold on a *fi fa*, and I hereby waive and release all relief from any and all appraisement, stay or exemption laws of any State now in force or hereafter to be passed."

The note and the warrant of attorney form one instrument; the signature of the defendant, with the seal attached, being underneath the warrant of attorney.

According to the evidence of Mr. Osmer, in the State of Pennsylvania, as it was, and is, here, where a power of attorney is given, judgment may be entered upon that without process being issued out of any court: and he says, that on the day following the giving of that note judgment might have been entered upon it without the intervention of an attorney, under the power itself; and that, according to the law, all that is required is that the payee of the note should take that to the prothonotary, and the prothonotary enters judgment under the terms of the power.

It was urged by counsel for the defendant, that having given this warrant of attorney the defendant did not know what the extent of the authority was that he was conferring upon the payee. Well, there was a mild disclaimer of knowledge by the defendant when he was in the box, but I find upon the evidence of Mr. Lyons that the defendant knew perfectly well that the warrant of attorney formed part of the contract when that note was given, and that by reason of his having conferred such power, under the law of the State, which he is assumed to know, it was not required that any process might be issued in order that judgment should be recovered upon it. That being so, the judgment, even if there had been some slight irregularities in it, was a perfectly valid judgment. He was a citizen of

the United States, and that was a continuing warrant of attorney from day to day to enter judgment during the whole of its existence.

Judgment.  
MacMahon, J.

In *Pemberton v. Hughes*, [1899], 1 Ch. 781, the first paragraph of the head note is as follows:—

“A judgment or decree pronounced by the court of a foreign country will be treated and acted upon here as final, notwithstanding the irregularity of procedure under the local law, provided the foreign court had jurisdiction over the subject matter and over the persons brought before it, and the proceedings do not offend against English views of substantial justice.”

In the present case the Pennsylvania court had jurisdiction over the subject matter and also over the person, for the defendant had himself given the court jurisdiction; and judgment was entered in accordance with the power so conferred. If ever there was a case in which proceedings did not offend against English views of substantial justice I think this is one. See *Bugbee v. Clergue*, (1900) 27 A.R. 96.

I direct that judgment be entered for the plaintiff for \$3,119.92, the amount of the original judgment, and interest from the day it was entered. I decline to grant a stay of proceedings.

From this judgment the defendant appealed to a Divisional Court, and the appeal was argued on the 10th day of October, 1900, before BOYD, C., and FERGUSON, J.

*W. E. Middleton*, for the appeal. Judgment was confessed in August, 1898, by the plaintiff's attorney in the Pennsylvania court upon the authority of a “judgment note” given by the defendant in 1882, when he was a domiciled resident of Pennsylvania. Shortly after signing the note the defendant left that state permanently and ceased to owe any allegiance whatever to it. It may be admitted that according to the law of Pennsylvania the judgment was properly entered, but, as the defendant was



Argument.

not at the time of the institution of the proceedings domiciled or resident in that state and owed no allegiance to it, the judgment is entitled to no extra-territorial recognition and is by international law an absolute nullity. The judgment note is not a submission to the courts of Pennsylvania sufficient to establish a conventional jurisdiction for all time wherever the defendant might be domiciled or resident, as it is not so expressed: *Sidar Gurdyal Singh v. The Rajah of Faridkote*, [1894] A.C. 670 at pp. 684 and 686. I also refer to *Grover & Baker Sewing Machine Co. v. Radcliffe* (1890), 137 U.S.R. 287; 30 Am. Law Reg. 289, note and cases there. Dicey's Conflict of Laws, 369, *et seq.*; *Bugbee v. Clergue* (1900), 27 A.R. 96; *Pemberton v. Hughes*, [1899] 1 Ch. 781.

*E. H. Smythe*, Q.C., *contra*. When the note and warrant of attorney were given the defendant was a resident with his family in Pennsylvania. The obligation is analogous in form to our warrant of attorney. When the defendant gave it he contracted to submit himself to the former where the judgment was obtained and the court had jurisdiction: *Rousillon v. Rousillon* (1880), 14 Ch. D. at p. 371. The authority to the attorney to enter judgment against him was an attornment to the jurisdiction of the court. In *Sidar Gurdyal Singh v. The Rajah of Faridkote*, [1894] A.C. 670, the defendant was not resident, and being a citizen of a foreign state when the action was instituted and was not amenable to the jurisdiction of the court where it was pending. In *Grover & Baker Sewing Machine Co. v. Radcliffe* (1890), 137 U.S.R. 287, the authority was to "any attorney of any court of record in the state of New York or any other state, to confess judgment," etc. The judgment was entered in the state of Pennsylvania on an application by the plaintiff in person. In an action on the judgment in the state of Maryland the judgment was declared to be invalid and not sufficient to maintain an action in the latter state as it did not appear that any

attorney had confessed judgment for him. The evidence here shews this judgment is a good judgment in any of the United States.

Argument.

*Middleton*, in reply, referred to *Grover & Baker Sewing Machine Co. v. Radcliffe*, *supra*, at pp. 297, 298; *Law v. Garrett* (1877), 8 Ch. D. 26; *Copin v. Adamson* (1875), 1 Ex. D. 17.

December 1, 1900. BOYD, C.:—

In this case judgment was confessed by an attorney of the court of Pennsylvania appearing for the defendant, pursuant to the warrant of attorney, executed under seal by the defendant on the 31st March, 1882.

Judgment was duly and in proper form signed by confession in the court of Common Pleas for Venango County (State of Pennsylvania) on 30th August, 1898, and an action has been brought now to enforce that judgment in Ontario.

There may be judgment without action or process by means of the intervention of an officer of the court appointed for that purpose by the debtor, according to law of Pennsylvania, to which the debtor subjected himself, and where he was resident when the warrant was given.

Judgment was signed when defendant was absent in Colorado, but that is not material as he waived service and notice by the terms of a warrant authorizing confession of judgment.

What was done was authorized by the law of Pennsylvania, and the defendant sanctioned the proceedings under that authority. Such a judgment so obtained by confession when in due form is valid everywhere and is a good starting point for an action on the judgment in another jurisdiction, as Ontario. See *Encyclopædia of Pleading and Practice*, Vol. 11, pp. 975, 982, 989, 1013, 1107, Title "Judgments."

Judgment.

Boyd, C.

This practice as to confessing judgment is analogous to that recognized in the Common Law Procedure Act, ch. 22, sec. 236 C.S.U.C., now carried into Rule 598 *et al.*

For the general rule is that a judgment valid by the laws and practice of the state where it is rendered or confessed, may be sued upon as a ground of action in any other state.

The authorities relied upon by the appellant do not shew that there was any want of jurisdiction in the Pennsylvania court or that the judgment sued on is to be deemed void. The case of *Sidar Gurdyal Singh v. The Rajah of Faridkote*, [1894] A.C. 670, was one in which the defendant being non-resident was served with process to which he paid no attention, and the judgment was *ex parte*. The original court had no jurisdiction over the absentee, and he never submitted himself to the jurisdiction by appearance or otherwise.

So in the United States case, *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U.S.R., at p. 298, the element of a properly confessed judgment is absent. The prothonotary who assumed to appear for the defendant was not authorized by him so to do—but was permitted to intervene in this way by a local enactment which was held to be not binding upon the absent defendant.

In other words the authority to sign judgment which he had given was not strictly pursued, and that was fatal to the confessed judgment in another jurisdiction.

In this case the defendant empowered “any attorney” to act for him in making confession of judgment, and that is accounted a sufficient designation to enable any one of the specified class to act: *Blanck v. Medley* (1895), 63 Ill. App. 211.

When he empowered any attorney of the State Court to appear for him he constituted that attorney who acted in giving the confession as his agent, and so had notice of the proceedings: *Bank of Australasia v. Harding* (1850), 9 C.B. at p. 687.

Judgment by confession is one instance of a party voluntarily submitting himself to the jurisdiction of the court whereby competence is acquired to deal with the matter submitted and so concludes that ground of objection: Dicey on Conflict of Laws, pp. 369, 370, and 376; *Maloney v. Gibbons* (1810), 2 Camp. 502; and see *Becquet v. MacCarthy* (1831), 2 B. & Ad. at p. 959 (which is not now, however, a case of general authority), and *Meens v. Thellusson* (1853), 22 L. J. Exch. 239.

The judgment is not void for want of jurisdiction and it was not impeached before us on any other ground.

Judgment affirmed with costs.

FERGUSON J., concurred.

G. A. B.

Judgment.

Boyd, C.

BOLAND V. THE CORPORATION OF THE CITY OF TORONTO  
ET AL.

*Assessment and Taxes—Failure to Distrain—List of Lands—Non-delivery by Clerk to Assessor—Omission to Notify Occupants—Non-delivery by Assessor to Treasurer of Certified List—R.S.O. 1887, ch. 193, secs. 135, 141, 142, 143 (R.S.O. 1897, ch. 224, secs. 147, 152, 153, 154).*

Where after a sale of land for taxes it appeared that there had been a failure to distrain, although sufficient goods were on the premises to have paid the taxes during each of the years they became due, and also that the account furnished by the assessor did not, as required by sec. 135 of R.S.O. 1887, ch. 193 (R.S.O. 1897, ch. 224, sec. 147), shew the reason why the taxes had not been collected; that there was no delivery to the assessor by the clerk of the list furnished him by the treasurer, as required by sec. 141 R.S.O. 1887, ch. 193 (R.S.O. 1897, ch. 224, sec. 153), and no notification, as also required by that section, by the assessor to the occupant or owner of the land, who lived in the vicinity, and whose name could easily have been ascertained, of its liability to be sold for taxes; and no certificate verified by oath, as required by sec. 142 R.S.O. 1887, ch. 193 (R.S.O. 1897, ch. 224, sec. 154); nor any list furnished by the clerk to the treasurer of the lands which had become occupied or were incorrectly described, as required by sec. 143, R.S.O. ch. 193 (R.S.O. 1897, ch. 224, sec. 155):—

*Held*, that the sale was invalid; and the invalidity was not cured by secs. 189, 190, R.S.O. 1887, ch. 193 (R.S.O. 1897, ch. 224, secs. 208, 209), which validate a sale on the expiration of two years from the making of the tax deed.

**Statement.**

THIS was an action brought against the corporation of the city of Toronto and Robert Jenkins, the purchaser at a sale for taxes of a lot in the city of Toronto to set aside the sale.

The action was tried before MACMAHON, J., at the non-jury sittings at Toronto, on September 12th, 1900.

The action against the city was dismissed by consent without costs.

*C. MacDonald*, for the plaintiff.

*Gibson*, for the defendants.

The facts are stated in the judgment.

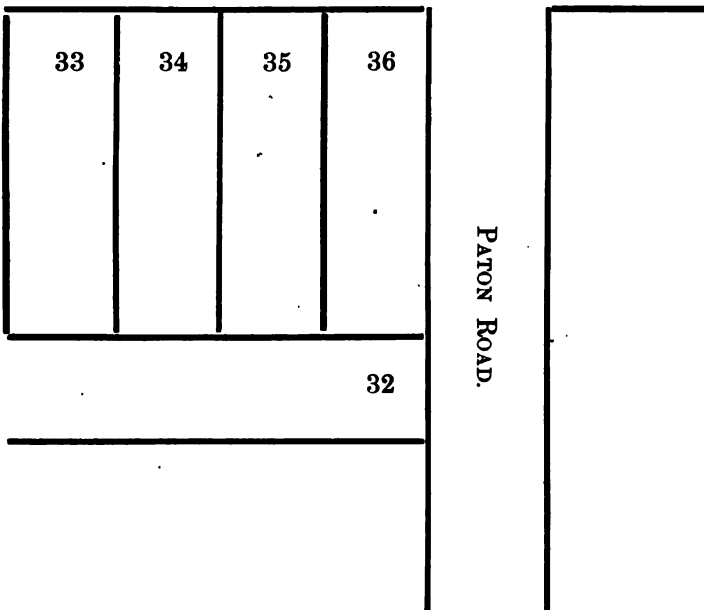
October 15, 1900. MACMAHON, J.:—

The plaintiff, on the 29th of December, 1873, became the purchaser from Joseph Hickson and Thomas Syming-

ton, of Montreal, executors and trustees of the will of John Shedden, deceased, the then owners of lots 33, 34, 35 and 36 on Symington Avenue, and lot 32 on Paton Road (being the lot in question in this action), which runs in depth the whole of the width of 33, 34, 35 and 36 on Symington Avenue, as shewn by the following sketch :

Judgment.  
MacMahon, J.

SYMINGTON AVENUE.



The lots contained about an acre each, and were fenced as one block with a substantial fence, and occupied and used by the plaintiff from the time he became the purchaser for the purpose of a market garden. His residence was about a quarter of a mile distant from these lots, and he cropped them every year and paid the taxes upon the lots as one parcel up to 1889.

In 1889, lot 32 on Paton Road was assessed as a vacant lot in the name of Thomas Symington, as owner; in 1890 it was assessed to J. Hexon and Thomas Symington, as a vacant lot; in 1891, to J. Hickson, "owner," as

**Judgment.** vacant land; in 1892, to Joseph Hickson, as vacant land; MacMahon, J. and in 1893, it was assessed as vacant land, "owner unknown."

The plaintiff received assessment slips for the years 1892 and 1894, each containing the lots 33, 34, 35 and 36, on Symington Avenue, and in each of those years he appealed against his assessment because of overvaluation.

It is a fact that would be apparent to any one on examining the slips that the whole of the block was not included in the assessment slips for either of those years. He says he is a man of limited education, and that he did not notice that the other lot—32 on Paton Road—which had been included in the assessment slips up to 1889, had been omitted from those slips. He had no notice of the assessment, because, as will presently be pointed out, of the want of compliance by the city clerk with the requirements of sec. 153 of R.S.O. 1897, ch. 224, although, as I have said, the whole of the land was in his use and occupation during every year from the early spring when he put in the crop until the last of the crop was removed about the end of October.

In 1894 this lot 32 on Paton Road was sold for taxes for the years 1889, 1890 and 1891, the amount of taxes then being some \$54 or \$55. When the sale took place the taxes for the years 1892 and 1893 were added to the amount for which the land was sold. Mr. Robert Jenkins became the purchaser, paying \$138.24, being the taxes claimed to be due on it. He received a deed therefor bearing date the 15th of June, 1896.

I find that the plaintiff was notified in July, 1896, that Jenkins had purchased and claimed to own the property, and Jenkins offered in November, 1898, to convey to the plaintiff for the sum of \$350. At that time the plaintiff offered to pay him \$250. Subsequently the demand by Jenkins was increased from \$350 to \$500, without which Jenkins refused to convey.

The evidence disclosed that the owner lived in the vicinity of these lots, and it could easily have been ascertained who it was that owned the land; and it is clear the lot should have been assessed as occupied: *Bank of Toronto v. Fanning* (in appeal) (1871), 18 Gr. 391; and *Hall v. Farquharson* (1888), 15 A.R. 457 at p. 476.

Judgment.  
MacMahon, J.

Then I find that there were enough goods and chattels on the property during each of those years to have paid the taxes, and the collector could have gone on the land and collected the taxes.

Section 147 of R.S.O. 1897 ch. 224, (sec. 135 of R.S.O. 1887 ch. 193, enacts that: "If any of the taxes mentioned in the collector's roll remain unpaid, and the collector is not able to collect the same, he shall deliver to the treasurer of his municipality an account of all the taxes remaining due on the roll; and in such account the collector shall shew opposite to each assessment, the reason why he could not collect the same by inserting in each case the words "*Non-resident*," or "*Not sufficient property to distrain*," or "*Instructed by Council not to collect*," as the case may be; and such collector shall at the same time furnish the clerk of the municipality with a duplicate of such account, and the clerk shall, upon receiving such account, mail a notice to each person appearing on the roll with respect to whose land any taxes appear to be in arrear for that year."

In the collector's final return to the treasurer, for 1889, although this lot is shewn to be assessed to Thomas Symington, the reason why the collector could not collect is not shewn opposite the assessment, as is required by the section. Under the heading "Reasons for non-payment" on the roll, the only reason assigned is the single word "Bailiff." The collector's final return for 1890 contains a like reason for the non-payment to the taxes as entered on the roll for 1889. And in the final return for 1891, the only entry made under "Reasons for non-payment" opposite the assessment is "Vacant lot."



Judgment.

MacMahon, J.

There was a copy of the list of lands liable to be sold for taxes, in which lot 32 on Paton Road was included as in arrear for the taxes for 1889 and 1890, furnished by the treasurer to the city clerk in 1893, as required by sec. 152 of R.S.O 1897, ch. 224, but the latter failed to deliver to the assessor in each year a copy of such list, as required by sec. 153, and ; therefore, such assessor was not called upon to perform the duty prescribed by the section of ascertaining "if any of the lots or parcels of land contained in such list are occupied, or are incorrectly described, and to notify such occupants and also the owners thereof, if known, whether resident within the municipality or not, upon their respective assessment notices, that the land is liable to be sold for arrears of taxes, and enter in a column (to be reserved for the purpose) the words "*Occupied and parties notified,*" or "*Not occupied,*" or "*Incorrectly described,*" as the case may be ; and all such lists shall be signed by the assessor or assessors and returned to the clerk with the assessment roll, together with a memorandum of any error discovered therein, and the clerk shall file the same in his office for public use ; and furnish forthwith to the county treasurer a true copy of the same, certified to by him under the seal of the corporation ; and every such list, or copy thereof, shall be received in any Court as evidence, in any case arising concerning the assessment of such lands."

The assessor is, by sec. 154, required to certify as to the correctness of the list.

In consequence of the failure of the city clerk to comply with sec. 153 it became impossible for him to carry out the directions contained in sec. 154. And as there were no lists the treasurer could not be furnished with a copy.

By sec. 176 "The treasurer shall not sell any lands which have not been included in the lists furnished by him to the clerks of the several municipalities in the month of January preceding the sale, nor any of the lands which

have been returned to him as being occupied under the provisions of sec. 155 of this Act, except the lands, the arrears for which had been placed on the collector's roll of the preceding year, and again returned unpaid and still in arrear in consequence of insufficient distress being found on the lands."

Judgment.

MacMahon, J.

As already pointed out there was no compliance with secs. 153 and 154; and the clerk could not, therefore, furnish the treasurer with the list prescribed by sec. 155 to be furnished.

There was, as far as the returns required by sec. 147 are concerned, no compliance with the Act, and as said by Mr. Justice Gwynne in delivering the judgment of the Supreme Court in *Caston v. City of Toronto* (1900), 30 S.C.R. 390 at p. 395, "The duties prescribed in sec. 135 of ch. 193, R.S.O. 1887" (now sec. 147 of R.S.O. 1897, ch. 224) "are enacted as the basis and foundation of all subsequent proceedings which are authorized to be taken for the recovery of taxes not paid while the rolls remain in the collector's hands unreturned; and that therefore the requirements prescribed in the section are imperative."

In *Love v. Webster* (1895), 26 O.R. 453 (following *Town of Trenton v. Dyer* (1893), 21 A.R. 379) Armour, C.J., held that the failure to comply with the provisions of secs. 141 and 142 of the Consolidated Assessment Act of 1892 (now R.S.O. 1897, ch. 224, sec. 153) requiring a true copy of the lists returned by the assessor to the clerk certified by the latter under the seal of the corporation to be furnished to the treasurer, formed a fatal objection to the validity of the sale.

The defects referred to in this case are not cured by secs. 208 and 209 of the Act. See the observations of the present Chief Justice of the Supreme Court (Sir Henry Strong), in *Whelan v. Ryan* (1891), 20 S.C.R. 65, at p. 72, where he observes upon *McKay v. Chrysler* (1879), 3 S.C.R. 436, and deals with the curative clause of the Manitoba statute, 45 Vict. ch. 16, sec. 7. See also *Haisley*

Judgment. v. *Somers* (1887), 13 O.R. 600, 605; *Hall v. Farquharson*  
*MacMahon, J.* (1888), 15 A.R. 457, 459; *Donovan v. Hogan* (1889), 15  
A.R. 432; *Dalziel v. Mallory* (1889), 15 O.R. 80, 83.

On the part of the defendant, it was set up that the plaintiff by paying the defendant for the hay he had grown on the lot in 1898 and 1899 had acknowledged his title. The plaintiff was, during these years, and had since 1873, when he purchased, been in continuous occupation of the lot; and he paid for the hay under protest, the defendant having threatened to send a bailiff to seize the hay.

I have not deemed it necessary to deal with the "collector's final returns" for the years 1892 and 1893, as I consider the tax sale was invalid by reason of the requirements of the statute not having been complied with as to the years 1889, 1890 and 1891.

There must be judgment for the plaintiff, declaring that the sale of the lot in question, being lot 32 on Paton Road, was illegal and void, and that he is entitled to have the tax deed cancelled.

The defendant must pay the costs of the action, but the plaintiff must pay to the defendant the sum paid to the City of Toronto when he became the purchaser at such tax sale, together with interest at 10 per cent. from the time of such payment, and also the taxes since paid by the defendant, together with interest at 10 per cent. from the time of the respective payments of such taxes.

G. F. H.

## STRUTHERS V. HENRY.

*Principal and Surety—Guaranty—Duration of.*

The defendant gave to the plaintiff a guaranty that in consideration of his endorsement for one F. of certain promissory notes for a large sum given by him for the purchase of a bankrupt stock, the defendant would guarantee the due payment of the amount of such notes at maturity, provided he was not called upon to pay in all more than \$2000:—

*Held*, that the effect of the guaranty was that it continued in force to the full extent of \$2000, until the last of the notes was paid, and that the defendant could not before such event relieve himself from liability by transmitting to the plaintiff \$2000 which he had received from F., being the proceeds of a portion of the stock.

THIS was an action to recover \$2,000 on a guaranty given by the defendant to the plaintiff.

Statement.

The action was tried before ROSE, J., at London, on September 26th, 1900.

*Gibbons*, Q.C., for plaintiffs.

*J. J. Scott*, Q.C., for defendant.

The facts are stated in the judgment.

November 7th, 1900. ROSE, J.:—

One J. C. Finch desired to purchase from the assignee of one M. P. Finch a stock of dry-goods, including clothing and men's furnishings. He applied to the plaintiffs to endorse his notes to enable him to make the purchase.

The defendant gave the plaintiffs the following guaranty:

“Springfield, Ont., Sept. 2, 1897.

“To Messrs. R. C. Struthers & Co.,

“London, Ont. :

“Dear Sirs,

“In consideration of your endorsing notes for Mr. J. C. Finch, to enable him to purchase the stock of M. P. Finch from his assignee, I hereby guarantee the due payment to you of the amount of the said notes at maturity, provided I am not to be called upon to pay in all more than two thousand dollars.

Judgment.

Rose, J.

"And I hereby further guarantee payment of all renewals granted by you in respect of the said notes, or any of them, from time to time, and hereby authorize you to renew the same from time to time, without reference to me. It being understood that this is a continuing guaranty until the notes given for the stock, together with interest thereon and renewals from time to time made, are fully paid and satisfied. Provided in any case that I am not to be called upon to pay more than two thousand dollars."

Relying upon this guaranty the plaintiffs did endorse notes to upwards of seventeen thousand dollars. Two of the notes remained unpaid, the sum of them amounting to over five thousand dollars. This action is brought to recover \$2,000 in respect of such notes.

The defendant pleads payment.

There is no dispute as to the facts. They substantially appear in the letter from J. C. Finch to the plaintiffs, dated the 2nd of July, 1900, in the following words :

"Messrs. R. C. Struthers & Co., London :

"Dear Sirs,

"Mr. D. W. Henry will send you \$2,000 to take up his guaranty for that amount in your favour. I had an opportunity to sell my clothing and gents' furnishing stock to Messrs. Christie & Caron, of Aylmer. The stock was transferred and money paid yesterday, and \$2,000 was given by me to Mr. Henry to pay as above. I think I better stick as closely to the dry-goods business as possible. Please send Mr. Henry his guaranty as soon as you receive the money. I am glad to have the guaranty disposed of, as I do not want Mr. Henry to have any interest in my business affairs."

On the 3rd of July the defendant wrote to the plaintiffs as follows : "Enclosed please find \$2,000 (two thousand dollars) in payment of guaranty given by me to you on the 2nd September, 1897, in connection with a purchase by Mr. J. C. Finch of this place and of the stock of N. P. Finch. Please send me receipt, and return my guaranty properly cancelled."

Judgment.

Rose, J.

The plaintiffs answered on the 4th of July to the defendant: "Yours with \$2,000 received. We cannot treat this as in satisfaction of your guaranty. You were to secure us against ultimate loss in respect of our whole indebtedness in respect of the purchase of the stock, balance of which is now \$4,000. This \$2,000 is money provided not by you but by Finch to our detriment as his creditor, and we cannot take it to be in any sense in satisfaction of your guaranty. We are content to apply the \$2,000 upon Mr. Finch's debt to us, but we cannot release you from your guaranty."

The defendant replied on the 6th of July as follows: "In reply to your letter of the 4th instant, I beg to say that the money was sent to you on the terms of my letter, to which I adhere."

By the document of the 2nd of September, 1897, the defendant guaranteed the payment of each and every note endorsed by the plaintiffs, and of each and every renewal until the last note was paid, so that, however, he should not be called upon to pay more than \$2,000.

If Finch had made default in the payment of the notes first falling due and the defendant had paid \$2,000 in respect of them, of course his liability would be at an end, but until Finch paid all his notes, or until the defendant paid \$2,000, the liability continued. The guaranty was not that Finch would pay \$2,000 on account of the notes, but that Finch would pay each and all of the notes.

If the defendant's contention be correct and Finch had, the day after the guaranty had been given, sold a portion of his stock and realized \$2,000 therefrom, he might have sent the money to the defendant to be forwarded as was done in this case, and the defendant's liability would have been at an end, although Finch might not pay anything further in respect of the notes.

I cannot think that this was the agreement between the parties. The effect of such an arrangement would have been that the undertaking of the defendant would

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Rose, J.

have amounted to an undertaking simply that Finch would out of the sales of his goods apply \$2,000 in payment of these notes.

It is clear that what the plaintiffs were contracting for, and what I think they obtained, was an undertaking from the defendant that until the last of the notes endorsed by the plaintiffs was paid, the plaintiffs would have the security of the defendant's undertaking to the extent of \$2,000.

I do not think that the sending of the money through the defendant made any difference, and I find as a fact that the defendant has not paid \$2,000, but that the money sent by him to the plaintiffs was a payment made by Finch and not by the defendant.

If this is a payment by the surety, would it not equally have been a payment by him had Finch sent the money direct to the plaintiffs, instructing them to apply it in discharge of the defendant's liability?

Counsel were unable to find any decision in point, and I have not been able to find any case similar to this.

The defendant relied upon *Midland Banking Co. v. Chambers* (1869), L.R. 4 Ch. App. 398, but I am unable to see how it assists him. The point decided in that case was that where the surety had contracted himself out of the right to a dividend from the debtor's estate, in case of bankruptcy, until the creditor had been paid in full, he, the surety, having paid the creditor the amount of his liability as surety, the creditor was entitled to rank for the full amount of the claim without crediting the surety with the amount paid by him, and that it made no difference that the surety had realised the amount that he had paid out of land sold under a mortgage which the debtor had given to him by way of security or indemnity against loss under the guaranty.

That case followed *Ex parte Hope* (1844), 8 M. D. & D. 720, where Lord Justice Knight Bruce, then Chief Judge in Bankruptcy, said, at p. 725: "I think that they" (the

creditors) "must take the surety's rights, if they take them at all, as he had them himself; that they cannot make any claim against the creditors' dividends which the surety could not have made; that he could not have made this claim, and that their petition must be dismissed." It is manifest that the question that we are now considering was not there discussed.

There must be judgment for the plaintiffs for \$2,000, and costs of suit.

G. F. H.

**Judgment.**

**Rose, J.**

# AGRICULTURAL SAVINGS AND LOAN COMPANY

V.

## THE LIVERPOOL, LONDON AND GLOBE INSURANCE COMPANY.

### *Fire Insurance—Prior Insurance—Renewal of Policy—Effect of.*

Where at the time of effecting an insurance against fire, there was a prior insurance in force, as to which no statement was made, either in the application or policy issued thereon, the renewal of such policy, without any such statement being then made, the prior insurance having then expired, does not validate the policy, the renewal being merely a continuation of the policy, and not a new insurance.

THIS was an action to recover the amount insured under a fire insurance policy, tried before ROSE, J., without a jury, at London, on the 27th September, 1900.

**Statement.**

*Bayley, Q.C., and R. A. Bayley, for the plaintiffs.*

*Riddell, Q.C., and A. Hoskin, Q.C., for defendants.*

The facts are stated in the judgment.

November 8th, 1900. ROSE, J.:—

At the time of the application for insurance in the defendant company, there was a prior insurance in the Perth Mutual Fire Insurance Company. This fact was not stated



Judgment.  
Rose, J.

in the application, or in the policy. The only insurance mentioned was the one in the Alliance Assurance Company that was effected on the same day as that in the defendant company. There was, of course, therefore, no assent to such insurance appearing in or endorsed upon the policy.

The answer that was made to this objection was, that, although there was prior insurance at the time of the application, it expired before the end of the first year of the insurance with the defendant company, at which time the renewal premium was paid and renewal receipt obtained; and it was argued on behalf of the plaintiff that the renewal amounted to a new contract of insurance.

On reason and authority this cannot be supported.

If at the time of the application the material fact was withheld, and nothing subsequent took place which raised an estoppel, it is difficult to see how the payment of a renewal premium, and the obtaining of a renewal receipt, could validate an invalid policy, especially when there is no evidence that the fact that there had been prior insurance was made known at the time of the renewal.

In *Howard v. Lancashire Ins. Co.* (1885), 11 S.C.R. 92, at p. 94, Ritchie, C.J., in delivering the judgment of the Court, said: "The renewal was merely a continuation of the original insurance and not a new policy." See also *London West v. London Guarantee and Accident Co.* (1895), 26 O.R. 520.

I think the objection is fatal to the plaintiff's claim. See *Billington v. Provincial Ins. Co. of Canada* (1879), 3 S.C.R. 182; *Gauthier v. Waterloo Mutual Ins. Co.* (1881), 6 A.R. 231.

It will be unnecessary, therefore, to consider the other objections taken to the plaintiffs' recovery.

The defendant company has been willing to repay the premium.

I think the proper order to make is to dismiss the action with costs, allowing the defendants to apply the premium money's received on account of costs, and to enter judgment for the balance of the costs.

Judgment.

Rose, J.

G. F. H.

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[DIVISIONAL COURT].

HIGHLAND V. SHERRY.

*Patent—Locatee—Improvements—Claim for.*

On an application being made for the patent to certain lands, a claim was made by the defendant, who had married the widow of the locatee, and had improved the land, to be allowed the value of such improvements, whereupon the Commissioner of Crown Lands directed that before the patent issued the amount, if any, payable to the defendant for his improvements and work on the land, after proper deductions, should be ascertained. A consent judgment was obtained referring it to the Master to enquire and report as to what sum, if any, the defendant was entitled to for permanent improvements and work done upon the land; for maintenance of the family of the locatee; and for any advances made to them, after making all proper deductions:—

*Held*, that while the consent judgment was silent as to the principle to be applied in ascertaining the amount payable to the defendant for the improvements, etc., having regard to the object of the Crown Lands Department, the proper mode was to award such sum as *in foro conscientie* the defendant ought to receive.

THIS was an appeal by the plaintiff from the judgment of the present Chief Justice of the Queen's Bench, dismissing his appeal from the report of the local Master at Owen Sound, dated 19th May, 1900, and from the judgment thereupon directed to be entered in the action.

Statement.

On September 5th, 1900, before a Divisional Court composed of MEREDITH, C.J., and FERGUSON, J., the appeal was argued.

*George Kerr*, for the appellant. The only question to be discussed is as to the value placed by the Master on the orchard planted by the defendant. The Master proceeded on a wrong principle. The principle to be adopted is that

**Statement.** laid down in sec. 30 of the R.S.O. 1897, ch. 119, namely, the amount "the land has been enhanced" by the improvements. The Master has given the defendant the actual value of the trees as they now are, that is not only giving him the cost of the trees, but their value as enhanced by what nature has done for them: *Queen Victoria Niagara Falls Park v. Colt* (1895), 22 S.C.R. 1.

*G. H. Tucker*, for the respondent. The defendant not only planted the trees, but took care of them, pruning them and cultivating them. The Master therefore properly took into consideration not only the actual cost of the trees, but their enhanced value by reason of the care and attention bestowed on them. There was also interest on the outlay, and taking these matters into consideration the amount allowed was not unreasonable: *Lightner v. Speck* (1897), 28 South Eastern Rep. 326.

November 26th, 1900. The judgment of the Court, in which the facts are stated, was delivered by

MEREDITH, C.J.:—

The plaintiff's father was the locatee of the Crown of the lot in question, and died on the 12th March, 1859, intestate, leaving a widow and five children, of whom the plaintiff is one. In the year 1864 the widow married the defendant, who then entered into and who continued in possession down to the death of his wife, which took place in 1896. The defendant and his wife and the younger children of the intestate lived together upon the land; and the defendant apparently treating it as his own, made improvements upon it in clearing and otherwise; and among other improvements he set out and cared for an orchard which, according to the finding of the Master, has added to the present selling value of the land the sum of \$383.75, which he allowed to the defendant.

An application was made to the Commissioner of Crown Lands for a patent, I judge, though the pleadings are

silent on the point, by the plaintiff, and a claim was made by the defendant for an allowance for his improvements, whereupon, as the statement of the claim alleges, the Commissioner directed that before a patent should be issued the amount, if any, payable to the defendant for his improvements and work upon the lands, after deducting what was right and proper to be deducted, should be ascertained.

Judgment.  
Meredith, C.J.

By the judgment pronounced at the trial, which was a consent judgment, it was ordered "that the following questions arising in this action, namely what sum (if any) the defendant is entitled to for permanent improvements made by him or work done by him upon lot 1 in the 3rd concession of Sullivan in the county of Grey, and for the maintenance of the family of the late Thomas Highland, the locatee of the said lands, and for any advances made to the members of said family, after making all proper deductions for work and labour done by said family, or by some one of them, upon said lands during the occupancy of same by the defendant, and for rents and profits of said lands during said occupancy, and for the insurance money received by the defendant heretofore in respect of said property, and for all goods and chattels of the said late Thomas Highland which came into the hands of the defendant, be referred for enquiry and report to John Creasor, Esquire, local Master at Owen Sound, under section 28 of the Arbitration Act."

The Master by his report found that the defendant was entitled to \$3241.95 for permanent improvements made by him on the lands, and for maintenance of the intestate's family, and advances made to them after all proper deductions for work and labour done by the family on the lands during the defendant's occupancy of them.

In this item of \$3241.95 is included the allowance for the orchard, which is in question in the appeal.

And after deducting a sum of \$2685.25 found to be chargeable to the defendant for rents and profits, the

Judgment.

Meredith, C.J.

balance of \$556.70 is found to be the sum to which the defendant is entitled.

The plaintiff appealed from the report, and his appeal was dismissed; and judgment was thereupon pronounced declaring that the defendant was entitled to a lien on the lands in question for the \$556.70 and the costs of the action and the appeal, and the plaintiff was ordered to pay these costs forthwith after taxation.

This judgment bears date the 6th April, 1900, and by it the appeal is dismissed, and the judgment I have mentioned is pronounced.

The plaintiff now appeals.

The consent judgment is silent as to the principle to be applied in ascertaining the rights of the defendant as to the improvements; whether that applied by the Court between mortgagee and mortgagor, or between trustee and *cestui que trust*, or between guardian and ward; and, it may be open to question, whether, as a matter of law, the defendant was in a position to make good any claim for his improvements, except in so far as he might be allowed for them as a deduction from the rents and profits chargeable to him.

It was, however, conceded on the argument that the consent judgment operated to declare the right of the defendant to be allowed for his improvements to the extent to which, if any, it should be found that the account shewed a balance in his favour.

In view of this, and it appearing that the purpose for which the Commissioner of Crown Lands desired the inquiry to be had, was to satisfy himself as to the existence and extent of the defendant's right to consideration in the Crown's dealing with the plaintiff's application for a patent, it seems to me that the question is not what are the nature and extent of the equitable rights of the defendant in the legal sense, if I may so speak of equitable rights, but what is the sum, if any, which *in foro conscientie* the defendant ought to receive: and so treating the

principle to be applied by the Court, I am unable to say Judgment.  
that the amount allowed by the Master for the orchard is Meredith, C.J.  
excessive; and it is to be further observed that there was  
no evidence supplied by the plaintiff from which it can be  
determined that a less sum should have been allowed. The  
cost of the trees when purchased by the defendant, is  
plainly not the limit of the amount to be allowed to him;  
beyond this there was the care of the trees, including the  
pruning of them, and the interest upon the defendant's  
outlay; and it is impossible to say that an account made  
up by adding such items to the original cost of the trees  
would not result in as large a sum being allowed as was  
allowed.

Upon the whole, I am of opinion that the judgment  
appealed from should be affirmed with costs, and the  
appeal dismissed with costs.

G. F. H.

## [DIVISIONAL COURT.]

## KNISELEY V. THE BRITISH AMERICA ASSURANCE COMPANY.

*Fire Insurance—Apprehension of Incendiary Danger—Application Filled in by Local Agent—Untrue Answer.*

An application for insurance on the contents of a barn, contained the question "Is there any incendiary danger threatened or apprehended?" to which the answer was "No." The plaintiff, who had not previously carried any insurance, stated that he effected the insurance, having learned that the owner of the barn had placed a high insurance on it, as well as on the adjacent dwelling-house. This was told by the plaintiff to the company's agent, who filled in the application and the answers to the questions. The application was then signed by the applicant, who was not an illiterate man, but he did not read over the application, and was not told that the question had been answered in the negative:—

*Held*, that the plaintiff was bound by his untrue answer to the question, it being material to the risk, for the reasonable inference was that the apprehension of incendiary danger as a fact existed.

*Graham v. Ontario Mutual Ins. Co.* (1887), 14 O.R. 318, *Chatillon v. Canadian Mutual Fire Co.* (1877), 27 C.P. 450, considered and commented on.

*Quære*, whether the inquiry raised by the question was not as to the apprehension of the applicant of incendiary danger, and not whether, as a fact, any incendiary danger was to be apprehended.

## Statement.

THIS was an appeal by the plaintiff from the judgment of BOYD, C., at the Welland sittings on 22nd May, 1900, dismissing an action to recover the insurance on the contents of a barn with costs.

The facts are stated in the judgment of the Chief Justice.

The appeal was argued before a Divisional Court composed of MEREDITH, C.J., and ROSE, J.

*German, Q.C.*, for the appellant. The question here was answered by the agent of the company without the plaintiff's authority, and without his knowledge that it had been so answered. The plaintiff told the agent of his apprehension of danger, and notwithstanding this the agent fills in the answer "No." The plaintiff, so far as he was concerned, answered "Yes." It was the act of the company's own agent that the answer was written "No." It must be assumed that the agent acting on behalf of the

company was satisfied that under the circumstances danger was not to be apprehended, and so filled in the answer. The meaning of the question is: Is danger as a fact to be apprehended. The agent was the agent of the company for this purpose, and not that of the assured. No doubt the agent is made the agent of the assured and not of the company, if he signs the application. Here, however, he did not sign the application. It was signed by the applicant himself. The company cannot take advantage of the wrong of their own agent. He referred to *Quinlan v. Union Ins. Co.* (1883), 8 A.R. 376; *Graham v. Ontario Mutual Ins. Co.* (1887), 14 O.R. 358; *Re Universal Non-Tariff Fire Ins. Co.* (1875), L.R. 19 Eq. 485; *Benson v. Ottawa Agricultural Ins. Co.* (1878), 42 U.C.R. 282.

*H. D. Gamble*, for the respondent. The question here is: Did the assured apprehend danger. There is no question but that he did; for his sole object in effecting the insurance was because of such apprehension; and after the fire occurred, his opinion was that the place had been intentionally burnt down. It was no part of the agent's duty to fill in the application. This must be done by the applicant himself. If the agent fills it in he does so as the agent of the applicant, and not of the company. It certainly could not be held that while he is not the agent of the company when he signs the application, he is to be the agent of the company when he fills in the answer to a question required to be answered by the applicant. If the assured had been an illiterate man there might be some ground for holding the company liable, as was done in *Chatillon v. Canadian Mutual Ins. Co.* (1877), 27 C.P. 450. Here the applicant could read and write, and was quite capable of understanding what he was doing. The case of *Campbell v. Victoria Mutual Fire Ins. Co.* (1880), 45 U.C.R. 412, is expressly in point, holding that the answer was a warranty, and relieved the company from liability. See also, *Herbert v. Mercantile*



Argument. *Fire Ins. Co.* (1878), 42 U.C.R. 384; *Findlay v. Fire Ins. Co. of North America* (1894), 25 O.R. 515; *Billington v. Provincial Ins. Co.* (1879), 3 S.C.R. 182; *Sowden v. Standard Fire Ins. Co.* (1880), 5 A.R. 290.

November 29th, 1900. MEREDITH, C.J.:—

The action is on a policy of fire insurance; and the sole question is whether the plaintiff's answer to question 23 of the application is, in the circumstances appearing in evidence, fatal to his claim to recover on the policy.

Question 23 is as follows: "Is there any incendiary danger threatened or apprehended?"

The application was filled up by the local agent of the defendants, and is signed by the plaintiff whose signature indicates that he is not an illiterate man; and this appears also from his evidence at the trial.

The application contains a provision by which the applicant agrees that if the agent of the company signs the application for him, the agent shall be the agent of the applicant and not the agent of the company.

The application was not signed by the agent for the applicant, but, as I have said, by the applicant himself.

It was not disputed, as indeed it could not be, that the information sought to be elicited by the twenty-third question was material to be made known to the defendants in order to enable them to judge of the risk they were asked to undertake.

It was, as the learned Chancellor says, frankly admitted by the plaintiff that up to the time of the insurance in question he had not carried any insurance on the property covered by the policy sued on; that he effected that insurance "having learned" that the owner of the buildings "in which the insured property was contained had placed a high insurance on it, and on the adjacent dwelling house, and becoming alarmed because he apprehended danger."

According to the evidence of the plaintiff he told all this to the agent when he made the application, and signed the application, not knowing that question 23 was answered "No," and indeed without any knowledge that the question was asked, and without reading or having read to him the application.

Judgment.  
Meredith, C.J.

The plaintiff did not in his evidence at the trial pretend that he did not when he made the application apprehend incendiary danger for the reason mentioned; but, it was argued on his behalf, that, in the circumstances I have mentioned as appearing in the plaintiff's evidence, he was not bound by the answer to the twenty-third question, and that, at all events, the inference might be drawn from what took place between him and the agent that incendiary danger was not in fact reasonably to be apprehended, which, it was further argued, was what, according to the true meaning of question 23, the plaintiff was asked to answer as to.

The case was dismissed at the close of the plaintiff's case, and is to be decided upon the evidence adduced on his behalf, practically his own testimony, and the inferences which a jury might have reasonably drawn from that evidence.

Had it appeared in evidence that upon the plaintiff stating to the agent his reason for effecting the insurance the agent had told him that his apprehension was groundless, and had convinced the plaintiff that it was so, I should have required to give the case further consideration before coming to the conclusion that the plaintiff's action must fail, for in that case the answer would not have been untrue in fact; and besides this his case would then have resembled *Graham v. Ontario Mutual Ins. Co.* (1887), 14 O.R. 358, in which, in what I take to be analogous circumstances to those suggested, it was held that an answer untrue in fact and, as to a matter material to be made known to the insurer, was not fatal to the plaintiff's claim, though that decision may appear, the plaintiff not

Judgment.  
Meredith, C.J.

being an illiterate man, to be in conflict with the earlier case of *Chatillon v. Canadian Mutual Fire Ins. Co.* (1877), 27 C.P. 450.

No such circumstances were stated, or even suggested by the plaintiff, to have existed, nor was there a statement by him that he did not really apprehend danger of incendiaryism from the cause he referred to at the time he signed the application.

I desire to guard myself from being taken to assent to the argument of the defendants' counsel that the inquiry made by question 23 is as to the apprehension of the applicant as to incendiary danger, and not as to whether as a fact incendiary danger is to be apprehended. There are, no doubt, dicta of eminent judges which support his contention; but, as I understand the cases, no decision upon the point, and I desire that, as far as I am concerned, it shall remain open for decision when it is necessary to decide it.

I quite agree, however, that the only reasonable inference which a jury could draw would be that the fact that incendiary danger was to be apprehended existed, when the only evidence upon the point is the admission of the plaintiff that he apprehended that danger for a reason that, at all events, unexplained would form a ground for such an apprehension being entertained by reasonable men.

It follows, therefore, that in this case the jury could not reasonably have drawn an inference which in any view of the meaning of question 23 would have entitled the plaintiff to succeed, and that the ruling of the learned Chancellor was right; and his judgment must, therefore, be affirmed, and the appeal from it dismissed with costs.

ROSE, J.:—

I agree in the result.

In my opinion the question "Is there any incendiary danger threatened or apprehended?" means now, that is,

at the date of the application threatened, or now apprehended, and that, "apprehended" means apprehended and not to be apprehended; and, further, means apprehended by the applicant.

If the applicant at the time of making the application really does apprehend danger, the company is entitled to know that it is apprehended, so that, if desired, enquiry may be made as to the grounds of apprehension, and the obligation to answer truthfully is binding whether the grounds are unreasonable or reasonable.

This view is that of the majority of the judges in the case of *Campbell v. Victoria Mutual Fire Ins. Co.* (1880), 45 U.C.R. p. 412; see pp. 418, 425-6; and I cannot agree that such opinions were *obiter dicta*. They seem to me to enter into and supply reasons for the judgment, though it may rest on other grounds as well.

As the facts of this case do not bring it within *Graham v. Ontario Mutual Ins. Co.* (1887), 14 O.R. 358; it is not necessary further to consider the question there raised. I do not understand that it is suggested that anything in it conflicts with the opinion I have now expressed.

G. F. H.

Judgment.

Rose, J.

## [DIVISIONAL COURT.]

## DAVIDSON V. McCLELLAND.

*Husband and Wife—Sale of Goods—Undisclosed Principal—Judgment Against Husband and Wife—Married Woman's Act, R.S.O. 1897 ch. 163—Division Court—Jurisdiction of.*

A husband, as agent for his wife, purchased goods from the plaintiffs, who were ignorant that she was the purchaser. On becoming aware of it, and the goods not having been paid for, they sued both husband and wife, but on the husband giving a promissory note signed by him for part of the debt, and the wife paying the balance in cash, the action was not further proceeded with. The note not having been paid at maturity, an action was brought in the County Court for the balance due on the goods, being the amount for which the note had been given, and judgment was entered against both husband and wife:—

*Held*, on appeal, that the proper inference was that the husband's note was not taken in satisfaction of the debt, nor was it an election to look to him alone for payment; and the plaintiffs were therefore entitled to sue on the original cause of action, but that they could not have judgment against both husband and wife; and must elect as to which they desired to hold it, and that they could properly hold it against the wife, a recovery against her being now maintainable under "The Married Woman's Property Act," R.S.O. 1897 ch. 168.

*Wagner v. Jefferson* (1876), 37 U.C.R. 551, distinguished.

*Held*, also, that the debt was not cognizable by the Division Court, the claim not having been ascertained by the signature of the wife; that the note signed by the husband could not be treated as such, it not having been signed by the husband as her agent, but as his own promise.

## Statement.

THIS was an appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Carleton, in favour of the respondents, at the trial which was held before him without a jury.

The facts are stated in the judgment.

On November 14th, 1900, the appeal was argued before a Divisional Court composed of MEREDITH, C.J., and ROSE, J.

*Kidd*, for the appellants. The plaintiffs cannot recover against both husband and wife. They must elect against which of them they desire to hold the judgment. The wife is, however, not liable. The taking of the husband's note by the plaintiffs and the cash payment by the wife

Argument.

was in full of the claim, and the wife was thereby released: Chitty on Contracts, 13th ed., p. 651; *Robinson v. Read* (1829), 9 B. & C. 449; *Lyth v. Ault* (1852), 21 L.J.N.S. Ex. 217; Addison on Contracts, 9th ed., p. 169. The action should have been brought in the Division Court. The note for the \$150 was liquidated by the signature of the husband. If, however, it was still to be considered the debt of the wife, the husband must be deemed to have signed as the wife's agent, and that is sufficient under the statute: *Regina v. Kent* (1873), L.R. 8 Q.B. 305.

*Herbert Mowat*, Q.C., for the respondents. The plaintiffs elect to hold the judgment against the wife. Under "The Married Woman's Property Act," as now contained in R.S.O. 1897 ch. 163, a judgment is properly recoverable against a married woman even without any proof of separate estate, and is enforceable against any separate estate she then has or may subsequently acquire. The case of *Wagner v. Jefferson* (1876), 37 U.C.R. 551, was decided on the then state of the law. That case was not referred to in the subsequent case of *Moore v. Jackson* (1893), 22 S.C.R. 210. Had it been, it would undoubtedly have been overruled. Then, as to the note for the \$150, it is quite clear from the evidence that this was not received as a payment with the intention to look to the husband, but merely as a temporary arrangement, and without any intention of releasing the wife. The promissory note not having been paid, the plaintiffs are entitled to maintain their action on the original cause of action: *Marsh v. Pedder* (1815), 3 East 147; *Drake v. Mitchell* (1803), 4 Camp. 251, 259; *Wegg Prosser v. Evans*, [1895] 1 Q.B. 108; *Calder v. Dobell* (1871), L.R. 6 C.P. 486. The plaintiffs being entitled to sue on the original cause of action, the claim was clearly not within the jurisdiction of the Division Court.

Judgment.

November 30th, 1900. MEREDITH, C.J.:—

Meredith, C.J.

The appellants are husband and wife. The husband acting on behalf of his wife purchased from the respondents the goods for the recovery of the price of which the action was brought. The respondents, when the goods were purchased, were not aware that the husband was acting as the agent of the wife in making the purchase, but having discovered that fact, and their debt being overdue and unpaid, brought an action for the price of the goods against both husband and wife, and after the service of the writ in that action they took the promissory note of the husband for \$150, and received in cash from the wife the balance of their claim, and thereupon the action was stayed, and was not further prosecuted.

The proper inference from the evidence is, in my opinion, that the promissory note was not taken in satisfaction of the debt, and that there was not an election by the plaintiffs to look to the husband alone for the balance of the debt. The taking of the promissory note was, as appears from the correspondence, a temporary arrangement entered into to enable the wife, while it was current, to procure the money required to pay what remained owing. The promissory note not having been paid, another action was brought after its maturity by the respondents against the husband and wife to recover the balance remaining due on account of the price of the goods, and the judgment which is in appeal was pronounced in that action. By it the respondents recovered judgment against the appellants for the residue of their debt with costs.

Upon the appeal being opened the respondents' counsel at once admitted that the judgment should not have been given against both husband and wife; but contended that the respondents were entitled to retain the judgment as against the wife.

It was suggested during the argument that the respondents were not entitled to recover from the wife, because at

the time their debt was contracted they did not know that her husband was making the purchase as her agent, and that, as was decided in *Wagner v. Jefferson* (1876), 37 U.C.R. 551, no liability is incurred by a married woman in such a case.

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Meredith, C.J.

The principle upon which that decision proceeded was that the contract of a married woman operated to bind her only if she was possessed of separate estate and contracted, or might reasonably be deemed to have contracted with respect to it, in which case the separate estate was bound; but no personal liability beyond that was incurred by the married woman; and that where, as in that case, the work was done and the materials were supplied to her agent for the benefit of her property, but without any knowledge at the time either of her or her separate estate, the separate estate was not charged for the debt, or the married woman liable to be sued at law in respect of it.

The reason for that decision no longer exists. The effect of the amendments which have been made to The Married Woman's Property Act since then has been to enlarge the capacity of a married woman to contract; and, since the 13th April, 1897, every contract entered into by a married woman, otherwise than as an agent, is deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into the contract, R.S.O. ch. 163, sec. 4; and it follows that the contract made in this case by the wife through her husband is by law a contract with respect to and binding on her separate estate, instead of that having to be determined as a matter of fact, as it was held in *Wagner v. Jefferson* (1876), 37 U.C.R. 551, was the case under the Married Woman's Act, which was in force when the transactions dealt with in that case took place.

The transactions between the appellants and respondents took place in 1899, and the amendment to which I have referred is therefore applicable to them.



Judgment.

Meredith, C.J.

It follows from what I have said that the judgment appealed from, in as far as it is a judgment against the wife, was right, and should be affirmed.

It was strongly urged by counsel for the wife that the claim against the wife was cognizable by the Division Court, and that, therefore, only costs on the scale of that court, with a set off to the defendant according to the practice in such cases, should have been allowed, the contention being that the signature of the husband to the promissory note was the signature of the wife's agent, and that therefore the amount of the respondent's claim was ascertained by the signature of the defendant within the meaning of the Division Courts Act, R.S.O. ch. 60, sec. 72, sub-sec. 1 (d).

That contention is not, in my opinion, well founded. It is true that the husband was in some part of the transaction the agent of the wife; but the promissory note signed by him, which, it was contended, must be treated as the signature of the wife within the meaning of the provision of the Division Courts Act relied on, was not signed, or intended to be signed, by him in that capacity, but as his own promise. It might possibly have been otherwise had the promissory note been given before the respondents became aware that the husband was acting as the agent of the wife.

The judgment as against the wife has been entered in the same form as if it were a judgment against a *feme sole*. This is wrong, and it should be amended so as to make it recoverable out of her separate estate, which is under the Act liable to satisfy it in the form in which judgments against a married woman according to the practice are entered.

In other respects the judgment against the wife must be affirmed, and her appeal dismissed with costs. The appeal of the husband must be allowed with costs, and

instead of the judgment which was entered against him, judgment must be entered dismissing the action as to him with costs.

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ROSE, J., concurred.

G. F. H.

### ARMSTRONG

v.

### THE MERCHANTS' MANTLE MANUFACTURING COMPANY, LIMITED.

*Company—Assignee for Creditors—Declaration of Trust—Right of Assignee to Sue—Cause—By-law—Time for Payment of—Forfeiture of Stock.*

The plaintiff sued as an assignee for creditors under an assignment which excepted shares in companies not fully paid up, and in which his assignor was declared a trustee for plaintiff, to transfer the shares in such way as he should direct. In this action plaintiff sought to have it declared that he was the owner of certain shares, standing in the name of his assignor, in a company incorporated under R.S.O. 1897, ch. 191, and that he was entitled to pay the balance of calls made thereon :—

*Held*, that he was not entitled to call on the company to account to him for the shares or any dealings therewith.

Under sec. 35 of the above statute, stock may be forfeited by the company where the amount payable on a call is not paid within the time limited by the special Act incorporating the company, or by the letters patent, or by a by-law of the company.

Where, therefore, no time was limited in the statute, or letters patent, or in the by-law making the call, such call was held to be illegal and an attempted forfeiture of the stock ineffectual.

THIS was an action claiming a declaration that the plaintiff was entitled to pay the balance of calls made on stock issued by the defendant company, and that he was the owner of the said stock as the assignee thereof, and for an account of all dividends to which he was entitled.

Statement.

The action was tried at London, before ROSE, J., without a jury, on September 25, 1900.

Gibbons, Q.C., for the plaintiff.

A. Mills, for the defendant.

Judgment.

November 6th, 1900. ROSE, J.:—

Rose, J.

One Frederick W. Watkins, of Hamilton, was a shareholder in the defendant company. On the 18th October, 1899, he made an assignment for the benefit of creditors to the plaintiff. At that time there remained unpaid on the subscribed stock held by him in the company a balance of twenty-five per cent.

On the 12th January, 1900, the directors passed the following resolution: "That this board authorize the managing director or president to make a further call upon the shareholders of twenty-five per cent. on the subscribed capital."

On the same day a notice was sent to Watkins, as follows: "You are hereby notified that a fourth call of twenty-five per cent. (\$250.00) on your subscription to the capital stock of the Merchants' Mantle Manufacturing Company (Limited) will be due (par at Toronto) January 17th. You are therefore required to make payment accordingly." This notice was signed by the president, G. B. Ryan.

On the 20th March, a resolution was passed by the directors requiring the president or other officer to notify Watkins that unless the amount of the call was paid on or before the 17th day of April, 1900, all stock subscribed by him would be forfeited in accordance with the by-law of the company in that behalf.

A notice, dated the 27th March, was sent to Watkins in accordance with this resolution.

On the 10th April Watkins wrote to the company acknowledging the receipt of the notification of the last call on stock payments, and regretting that he was unable to comply with it at that time.

On the 11th May following a resolution was passed by the directors by which the stock was "forfeited and cancelled."

It is contended that the call was invalid, and that the attempted forfeiture was not effective, by reason of there having been no time fixed by the Act or letters patent or by-laws for the payment of the call.

Before determining that question, however, I must consider the status of the plaintiff.

The action, as originally framed, asked for a declaration that the plaintiff was entitled to pay the balance of the calls on the stock, and that he should be then declared to be the owner as assignee of one thousand dollars paid up stock in the defendant company; and also asked for an account of all dividends to which he was entitled upon the stock.

At the trial I gave permission to amend; and by the amended statement of claim "The plaintiff seeks that such alleged forfeiture for non-payment of calls on the part of the defendant company may be declared to be null and void, and that the position and rights of the parties may be declared to be the same as if the alleged said call had not been made or the said stock forfeited in consequence of the non-payment thereof."

It is clear that the deed of assignment does not transfer the stock in question. "Shares in companies or corporations not fully paid up" were expressly excepted from the operation of the assignment. But in the deed of assignment the debtor declared that as to such shares he should stand possessed thereof "in trust for and to transfer, convey and assure the same as the said assignee should from time to time direct;" and he further declared that the assignee should have the right "to receive all dividends and other advantages which may accrue from any such shares aforesaid."

I need not therefore consider so much of the argument as was addressed to me at the trial *pro* and *con* on the question of the right of the company to refuse assent to the transfer of stock to the plaintiff, having regard to the objects of the company and the effect of the decisions in

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*Re Gresham Life Assurance Society, Ex p. Penney* (1872), L.R. 8 Ch. 446, and *Re Coalport China Co.*, [1895] 2 Ch. 404; but I think the plaintiff could not have become a valid transferee of the stock or have insisted upon the company accepting him as a shareholder. The status of the plaintiff is dependent upon the declaration of trust in his favour.

I am of opinion that, as far as such declaration of trust seeks to accomplish indirectly what might not be done directly, it is ineffective; and that, if the plaintiff could not insist upon being recognized as a shareholder, he cannot occupy that position practically by being declared to be a *cestui que trust* of the shareholder. The declaration of trust does not, in my opinion, entitle the plaintiff to call upon the company to account to him for the shares or for any dealing with the shares. The shareholder, and the shareholder alone must, I think, be the person to deal with the company, who is answerable to the company in respect of the shares, and to whom the company must account for his interest in its capital stock.

The contention of the plaintiff, that he was entitled to receive notice of the call and of the proceedings taken upon such call, in my opinion fails.

Whether if the forfeiture is valid, the plaintiff is entitled to have paid to him by the company any moneys payable to Watkins might require consideration; but such claim is not made here. The contention the plaintiff makes is that the attempted forfeiture was not effective and that Watkins is still a shareholder in such company. If that is the proper conclusion, I think any action taken against the company to declare the rights of Watkins should be taken in his name.

I give the plaintiff leave, on filing Watkins's written consent, to have him added as a co-plaintiff, so that the point really in issue between the parties may be decided in such a way as to be binding upon Watkins and the company.

Assuming that Watkins will be added as a plaintiff, I come now to consider whether a valid call was made, and whether the steps taken by the company to forfeit the stock reached that end.

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Rose, J.

The statute governing the case is R.S.O. 1897, ch. 191, sec. 35, which provides as follows:—"If after such demand or notice as by the special Act or by the letters patent or by-laws of the company is prescribed any call made upon any share or shares is not paid within such time as by such Act or by such letters patent or by by-laws may be limited in that behalf, the directors in their discretion by resolution to that effect reciting the facts and duly recorded in their minutes may summarily forfeit any shares whereon such payment is not made, and the same shall thereupon become the property of the company and may be disposed of as, by by-law or otherwise, the company may ordain."

It is clear here that no time was limited by the Act or letters patent or by-laws. The resolution authorizing the president to make a call limited no time. The notice signed by the president did limit a time; but that was clearly insufficient; and I think the objection is well taken.

The point seems to me to be covered by authority. See *Re Cawley & Co.* (1889), 42 Ch. D. 209. The question is dealt with by the judges; and at p. 235 Fry, L.J. said: "In fact I scarcely know what the making of a call is, except the fixing of a time at which the money is to be paid." See also *Johnson v. Lyttle's Iron Agency* (1877), 5 Ch.D. 687, cited in *Re Cawley & Co.* (1889), 42 Ch. D. 209; *Provident Life Assurance and Investment Co. v. Wilson* (1865), 25 U.C.R. 53; *Toronto Gas Co. v. Russell* (1849), 6 U.C.R. 567; *London Gas Co. v. Campbell* (1856), 14 U.C.R. 143, which also, as well as the case last cited, is an authority to shew that the letter written by Watkins, of date the 10th April, does not affect his right to call in question the action of the board.

Judgment.

Rose, J.

In *Johnson v. Lyttle's Iron Agency* (1877), 5 Ch. D. 687, it was held, per James L.J. at p. 694: "That no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest. Here the notice is inaccurate. It is therefore bad, and the forfeiture is invalid."

The learned judge further says: "I may add that, as at present advised, I think that the time for the payment of the call could not properly be fixed by mere verbal direction to the secretary; it ought to be fixed by formal resolution of the directors."

The other judgments were to the like effect.

If Watkins is added as a party plaintiff, there may be a declaration that the call was invalid, and the attempted forfeiture ineffectual; but I think the plaintiff may not have any costs, as this is the second amendment that I have allowed.

If Watkins refuses to consent to be added as a plaintiff, an application may be made to me to consider whether under any circumstances he could be made a party defendant. As to this, of course, I express no opinion.

I do not think I can give the defendant any costs, as the question upon which I have expressed an opinion was a substantial one in controversy at the trial.

G. F. H.

GEORGE N. MORANG & CO., LIMITED

V.

THE PUBLISHERS' SYNDICATE, LIMITED.

*Copyright—Books—Infringement—5 & 6 Vict. ch. 45 (Imp.)—Application to Colonies—Importation of Foreign Reprints—Assignment of Proprietorship—Necessity for Registration—Status to Maintain Action.*

Upon a motion for an interim injunction restraining the defendants from importing into Canada for sale, and from exposing and offering for sale, copies of a book written by Francis Parkman, known as "A Half Century of Conflict," in infringement of the plaintiffs' copyright in such book, it appeared that at the time of the author's death he was the owner of and entitled to the copyright in such book for the British dominions, including Canada, and that after his death such copyright and ownership had been assigned and transferred to the plaintiffs by those upon whom they devolved; that the defendants had imported copies of the book from the United States of America and were offering them for sale in Canada:—

*Held*, that sec. 17 of the Imperial Act to amend the Copyright Act, 5 & 6 Vict. ch. 45, prohibiting the importation of foreign reprints by any person, not being the proprietor of the copyright or some person authorized by him, is now in force in Canada; and the plaintiffs were, therefore, entitled to prohibit the importation of foreign reprints into Canada.

2. But the plaintiffs had no right to maintain this action or proceeding, for, although they were the assignees of the proprietorship and ownership of the book, they had not complied with sec. 24 of 5 & 6 Vict. ch. 45 by causing an entry of their proprietorship to be made in the book of registry of the Stationers Company, the word "proprietor" in sec. 24 meaning the person who is the present owner of the work. Dictum of COCKBURN, L.C.J., in *Wood v. Boosey* (1867), L.R. 2 Q.B. 340, not followed.

*Weldon v. Dicks* (1878), 10 Ch. D. 247, and *Liverpool General Brokers' Association v. Commercial Press Telegram Bureau*, [1897] 2 Q.B. 1, followed.

MOTION for an order and injunction restraining the defendants until the trial or other disposition of the action from importing into Canada for sale, and from exposing and offering for sale, copies of the book written by Francis Parkman known as "A Half Century of Conflict," in infringement of the plaintiffs' copyright in the said book, and in infringement of the plaintiffs' copyright in the book known as "Chapters from Parkman;" but as to the latter the plaintiffs abandoned the motion. The facts were set forth in the affidavit of Mr. Morang, the president of the plaintiff company, in which he stated: That

Statement.



**Statement.**

the plaintiffs were the proprietors of and entitled to the copyright for the British dominions, including Canada, of the book "A Half Century of Conflict," of which Francis Parkman was the author. That the certificate of the entry of such book under the hand and seal of the registering officer appointed by the Stationers' Company was marked Exhibit "A" to his affidavit. That the said Francis Parkman died in or about the month of September, 1893, being still the owner of and entitled to the copyright in the said book for the British dominions, including the Dominion of Canada, and the right and title of the said Francis Parkman in such copyright thereupon devolved upon and became vested in Grace P. Coffin, of Brookline, in the State of Massachusetts, and in Catharine S. Coolidge, and the said Catharine S. Coolidge having subsequently died, and John T. Coolidge junior, of the city of Boston, in the State of Massachusetts, having been appointed her executor, the copyright in the said book for the British dominions, including the Dominion of Canada, thereupon became and was, on the 17th day of August, 1900, vested in the said Grace P. Coffin and John T. Coolidge, as executor of the estate of the said Catharine S. Coolidge. That on the 17th day of August, 1900, the said Grace P. Coffin and John T. Coolidge junior transferred and assigned to the plaintiffs the said copyright and the proprietorship of the works of the said Francis Parkman, amongst other of the said book "A Half Century of Conflict," and the plaintiffs thereupon became the owners of the copyright therein for the British dominions, including the Dominion of Canada, and the sole persons entitled to publish the said book "A Half Century of Conflict" in the Dominion of Canada, or to import the same into the Dominion of Canada or offer the same for sale therein. That the said Grace P. Coffin and Catharine S. Coolidge, being then the proprietors of and entitled to the copyright for the British dominions, including the Dominion of Canada, in the said book known as "A Half Century of

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Conflict," on the 9th day of December, 1898, assigned to the plaintiffs the proprietorship and ownership and copyright, amongst other portions of the works of the said Francis Parkman, of the first chapter of the book called "A Half Century of Conflict," the said chapter being entitled "Eve of War." That the defendant company had recently imported into Canada for sale, and had exposed and offered for sale, copies of the said book, published by the firm of Little, Brown, & Company, of the city of Boston, in the State of Massachusetts. That in the spring of the year 1900 the defendants were importing from the United States of America copies of the works of the said Francis Parkman, amongst others, the said "A Half Century of Conflict," and the plaintiffs then notified the defendants that they claimed to be entitled to the sole copyright of the works of Francis Parkman, amongst others in the said book "A Half Century of Conflict," and the defendants were importing the said book for sale and offering the same for sale with full knowledge of the plaintiffs' rights in the premises, and in direct defiance thereof.

Exhibit "A" to this affidavit shewed that the time of entry at Stationers Hall, London, was the 16th June, 1892, the title of the book "A Half Century of Conflict," by Francis Parkman; name of publisher and place of publication, MacMillan & Co., 29 and 30 Bedford street, Covent Garden, London; name and place of abode of the proprietor of the copyright, Francis Parkman, U.S.A.; date of first publication, 21st May, 1892.

The assignment referred to as Exhibit "A" was, as to the effective words: "Do give and grant unto the party of the second part (the plaintiffs) the proprietorship and ownership of the works of the said Francis Parkman particularly defined and described as: "Pioneers of France in the New World," "The Jesuits in North America," "La Salle and the Discovery of the Great West," "The Old Régime in Canada," "Count Frontenac and New France

Statement. under Louis XIV.," and "The Oregon Trail," each in one volume, and "A Half Century of Conflict," "Montcalm and Wolfe," and "The Conspiracy of Pontiac," each in two volumes."

There was no other evidence of assignment or registration.

The motion was heard by ROBERTSON, J., in the Weekly Court, on the 20th December, 1900.

*Walter Barwick*, Q.C., and *J. H. Moss*, for the plaintiffs. The provisions of the Imperial Copyright Act, 1847, prohibiting the importation into the Colonies of foreign reprints of British copyrighted works, are only suspended as to Canada so long as the Act 31 Vict. ch. 56, imposing an *ad valorem* duty for the benefit of the copyright owners, remains in force. By R.S.C., schedule A., p. 2278, the Act of 31 Vict. was repealed, and the collection of the *ad valorem* duty was abandoned under the provisions of the Dominion Tariff of Customs Act, 1894, item 104; and the prohibitions of the Imperial Copyright Act thereupon again came into force.

*J. L. Ross* and *A. W. Holmested*, for the defendants. First; registration of the assignment is necessary. 1. Under sec. 24 of 5 and 6 Vict. ch. 45 registration is necessary by the proprietor of the copyright before maintaining any action in respect of any infringement of his copyright: *Scrutton on Copyright*, 3rd ed., p. 146; *Cohen on Copyright*, 1896 ed., p. 30; *Low v. Routledge* (1864), 10 L.T.N.S. 838; *Liverpool General Brokers' Association v. Commercial Press Telegram Bureaux*, [1897] 2 Q.B.1. 2. "Proprietor" does not mean "original proprietor," as stated in the dictum of Cockburn, L.C.J., in *Wood v. Boosey* (1867), L.R. 2 Q.B. 340. See the judgment of Malins, V.-C., in *Weldon v. Dicks* (1878), 10 Ch. D. 247, at p. 253. Second; the documents produced are not and did not purport to be assignments of the British copyright. 1. Copyright is a peculiar property, "the creature" of the statute: *Jefferys v. Boosey* (1854), 4

H.L.C. at p. 839. 2. There is a clear distinction between the right before and the right after publication: *ib.*, pp. 978, 979. "An entirely different thing:" *per* Lord St. Leonards, p. 979. See also the opinions of Crompton, J., p. 856; Parke, B., at p. 930 and p. 931; Jervis, C.J., at p. 944; Lord St. Leonards was of the same opinion, p. 992. In *Jefferys v. Boosey* the British copyright was not in existence when the assignment Bellini to Ricordi was made, and it was held that only the Milanese copyright was transferred. The opinions of the above learned Judges apply with greatly added force in this case, where there is in existence something distinct from ownership of the book or manuscript, which alone the documents purport to convey, viz., the statutory monopoly, the exclusive liberty of printing, etc., which is, as Lord St. Leonards held, an "entirely different thing." Third; sec. 17 of 5 & 6 Vict. ch. 45 is not in force in Canada. The order in council of the 7th July, 1868, has not been revoked unless both the order in council and sec. 17 are superseded by 39 & 40 Vict. ch. 36 (Imp.). By sec. 17 of 5 & 6 Vict. ch. 45, amended by sec. 4 of 39 & 40 Vict. ch. 36, Canada is constituted, so far as the subject-matter of sec. 17 is concerned, a foreign country, and as amended sec. 17 applies only, so far as Canada is concerned, to importation from Canada into the United Kingdom. Only to such importation does sec. 17 now apply. If the book is not entitled to Canadian copyright under the Canadian Act, sec. 17 and the order in council of the 7th July, 1868, may possibly apply. It is not open to the plaintiffs to say that the book "A Half Century of Conflict" is not entitled to Canadian copyright. They contend and attempt to prove Canadian copyright. We adopt the argument advanced and authorities cited by Sir John Thompson in Blue Book C. 8573, as shewing that sec. 17 of the Act of 5 & 6 Vict. is not in force in Canada, at least where the book which is the subject of the copyright is entitled to Canadian copyright. This is without prejudice to the contention that the book

## Argument.

in question is not entitled to Canadian copyright. See judgment of Rose, J., in *Graves v. Gorrie* (1900), (*ante* p. 266).

*Barwick*, in reply. First; the registration of the assignment to the plaintiffs is not necessary. All that is required is, that the proprietor before commencing an action shall have caused an entry to be made of the book: 5 & 6 Vict. ch. 45, sec. 24. This requirement has been complied with by the registration in the name of the author. Nothing is said in this section about registering title to the copyright or to the work. It is the book alone which must be registered. The word "assigns" is specifically defined by the statute (sec. 21), and registration of the assignment is throughout the Act treated on a different basis from registration of proprietorship. See sec. 13, which provides for the registration of the book itself by the proprietor, and then provides, not that assignments may be registered, but that an assignment may be made by entry in the book of registry, and that such assignment shall be of the same force and effect as if made by deed. The opinions of the Judges in *Wood v. Boosey*, 7 B. & S. 869 and L.R. 2 Q.B. 340, ought to be followed in preference to the opinion of Kennedy, J., at the trial of the case of *Liverpool General Brokers' Association v. Commercial Press Telegram Bureaux*, [1897] 2 Q.B. 1. Although the former case was not decided upon this very point, the report of the case shews that it was fully considered by the Judges. Second; the form of assignment to the plaintiff is sufficient. This point is completely covered by the case of *Lacy v. Toole* (1867), 15 L.T.N.S. 512, cited in Copinger, 3rd ed., at p. 185. Third; it is argued on behalf of the defendants that sec. 17 of 5 & 6 Vict. ch. 45 is not in force in Canada, and, in support of this, reference is made to the arguments advanced by Sir John Thompson in his controversy with the Colonial Office. His contention was, that where a book which was the subject of copyright was entitled to Canadian copyright, the English Copyright Act was not in force in Canada. This argument throughout

Argument.

the controversial correspondence was always opposed upon the ground that the powers of legislation conferred on the Dominion Parliament by the British North America Act did not authorize that Parliament to amend or repeal the provisions of any Imperial Act. It was always contended by the Colonial Office that no Canadian Act of Parliament could affect the question, in view of the Imperial Colonial Laws Validity Act, 1865, which declared by sec. 2 that "any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative." In any event, however, Sir John Thompson's arguments do not apply to the case, as "A Half Century of Conflict" is not entitled to Canadian copyright until it is printed in Canada. Reliance is also placed upon the judgment of Rose, J., in *Graves v. Gorrie*, (*ante* p. 266). There the learned Judge is dealing not with literary but with artistic copyright, which is governed by an entirely different statute. He clearly points out that the Literary Copyright Act is in force in Canada, in view of the express provisions of the statute, and he holds that the statute governing artistic copyright is not in force, because in that statute the provisions are absent which are contained in the Literary Copyright Act, there being nothing in the Artistic Copyright Act extending its provisions beyond Great Britain.

December 27, 1900. ROBERTSON, J., (after setting out the facts and arguments as above):—

I will consider the last objection taken by the defendants first, for the reason that if the Imperial "Act to

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amend the Copyright Act," 5 & 6 Vict. ch. 45, is not in force here, that unquestionably puts an end to the plaintiffs' case.

The 29th section expressly extends copyright to the United Kingdom, and to every part of the British dominions. And the 17th section prohibits the importation of foreign reprints by any person, not being the proprietor of the copyright or some person authorized by him: and it empowers the officers of the Customs to seize and destroy such books, etc. See *Routledge v. Low* (1868), L.R. 3 H.L. 100.

In *Smiles v. Belford* (1877), 1 A. R. 436, it was held, affirming the judgment of Proudfoot, V.-C., 23 Gr. 590, that it is not necessary for the author of a book, who has duly copyrighted the work in England under 5 & 6 Vict. ch. 45, to copyright it in Canada under the Canadian Copyright Act of 1875, with a view of restraining a reprint of it there; but, if he desires to prevent the importation into Canada of printed copies from a foreign country, he must copyright the book in Canada. See; also, R.S.C. ch. 62, sec. 6.

In 1847 the Imperial Act which bears the title of "The Colonial Copyright Act, 1847," was first passed. This Act authorized Her Majesty in case the Legislature in any British possession should be disposed to make due provision for securing or protecting the rights of British authors of such possession, and should pass an Act or make an ordinance for that purpose, to express Her Royal approval of said Act or ordinance, and thereupon to issue an order in council declaring that so long as the provisions of such Act or ordinance continued in force within such Colony the prohibitions against the importation of foreign reprints and any prohibitions contained in any Acts against the importing, selling, letting out to hire, exposing for sale or hire, or possessing foreign reprints, should be suspended so far as regards such Colony; and thereupon such Act or ordinance was to come into opera-

tion, except so far as might be otherwise provided therein.

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Every such order in council was to be published in the *London Gazette*.

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The Province of Canada placed itself under the provisions of this Act by the passing of 13 & 14 Vict. (1850) ch. 6 (consolidated in 1859 with the Copyright Act, C.S.C. ch. 81, and becoming in that Act secs. 15, 16, and 17).

The proclamation of the Governor-General (Lord Elgin) signifying Her Majesty's royal approval of the Act of 1850 and the passing of the Imperial order in council (*London Gazette*, 24th December, 1850) was issued on the 23rd April, 1851, (*Canada Gazette*, 1851, p. 10631).

On the 25th April, 1851, an order of the Governor-General in council was passed imposing a duty of twelve and a half per cent. on foreign reprints of works copyrighted in Great Britain and described in lists to be published in the *Canada Gazette*, in order that the proceeds of such duty might be paid over to the persons beneficially interested in the copyrights.

This still left the proviso of the Imperial Act, 1842, in force in Canada which prohibited reprinting.

In 1868 the Parliament of Canada passed an Act (31 Vict. ch. 56) similar to the statute of the old Province of Canada, 1850, 13 & 14 Vict. ch. 6. Apparently, from the recitals of this Act, it was passed to remove doubts as to the intent of the Act passed at the then present session of Parliament imposing duties of customs with the tariff of duties payable under it, and the Act declares that it was not the intention of the Customs Act referred to (31 Vict. ch. 7) that any duty imposed on foreign reprints of such British copyright books as are mentioned in the foregoing sections of this Act, by any Act of the late Province of Canada or by any order of the Governor of that Province in Council made or to be made under such Act, or by any Act of the Legislature of the Province of Nova Scotia or of New Brunswick, for the purpose of being distributed to or among the party or parties beneficially interested in the



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copyright, should be repealed, and any such duty shall continue to be collected for the purposes aforesaid until a duty shall be imposed for like purposes under this Act, after which it shall cease.

Her Majesty by order of the Privy Council approved of the Act of 1868 on the 7th July, 1868, and on the same day an order of the Privy Council was passed providing that, so long as the provisions of the Act of 1868 continued in force within Canada, the prohibitions against the importing, etc., of foreign reprints first composed, written, printed, and published in the United Kingdom and entitled to a copyright thereunder, should be suspended as far as regards Canada.

The proclamation of the Governor-General (Lord Monck) signifying Her Majesty's royal approval of the Act and the issuing of the Imperial Order in Council was issued on the 24th September, 1868.

On the 28th September, 1868, an order in council was passed imposing a duty of twelve and a half per cent. *ad valorem*.

In the schedule to the Revised Statutes, 1886, shewing the history and disposal of Acts prior to revision, the Act of 1868 is stated to have been superseded by 42 Vict. (1879) ch. 15, and is recommended for repeal.\* The Act of 1879 is the National Policy Tariff Act. There is no reference in this Act to the provisions of the statute of 1868 beyond this in the schedule of duties (see schedule "A", p. 123): "British Copyright works, reprints of; six cents per lb. and in addition thereto twelve and a half per cent. *ad valorem*."

On the 28th March, 1894, the following order of the Governor-General-in-council was passed in reference to the proposed abandonment in the Tariff then before Parliament of the collection of the twelve and a half per cent. *ad valorem* :—

\* And is repealed by the repealing schedule A, R.S.C., p. 2278.

"On a report, dated 24th March, 1894, from the Minister of Trade and Commerce, upon the provisions of the Canadian Tariff, about to be introduced in the House of Commons of Canada, affecting the subject of copyright, stating that hitherto, at great expense and trouble, a duty of twelve and a half per cent. has been collected on foreign reprints of British copyright works for the benefit of copyright holders, over and above the duty payable for the benefit of the revenue of Canada, and calling attention to the fact that in the tariff now proposed this collection of twelve and a half per cent. will cease to be made after the expiration of the next session of Parliament, in view of the changes which are expected in the Imperial Copyright laws in so far as they apply to Canada.

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"The Committee on the recommendation of the Minister of Trade and Commerce advise that Your Excellency be moved to forward a certified copy hereof to the Right Honourable the Secretary of State for the Colonies."

The Tariff of Customs Act, 1894, contained the following provision (57 & 58 Vict. ch. 33, Item 101):—

"British copyright works, reprints of, six cents per pound and in addition thereto twelve and one half per cent. *ad valorem* until the end of the next session of Parliament, and thereafter six cents per pound."

The collection of twelve and a half per cent. ceased on the 22nd July, 1895, when the session of Parliament of 1895 ended.

The effect of the repeal, at the revision of 1886, of the Act of 1850, and the abandonment in 1895 of the collection of the twelve and a half per cent. *ad valorem* duty upon foreign reprints for the benefit of the owner of British copyright, revived the provisions of the Imperial Act of 1847, prohibiting the importation of foreign reprints of British copyrights, for the Imperial Act of 1847 and the order of the Queen in council under which the prohibitions contained in the Act of 1842 against the

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importation of foreign reprints were suspended only provided for such suspension so long as the provisions of the Canadian Act of 1850, under which the twelve and a half per cent. was collected, continued in force within Canada.

I am, therefore, of opinion that the objection taken by the defendants is not sustainable, and that, on that ground, the plaintiffs' copyright is in force in Canada, and they are entitled to prohibit the importation of foreign reprints into Canada.

Then, as to the objection first taken, as regards the right of the plaintiffs to maintain this action or proceeding, they being assignees of "the proprietorship and ownership" of the works.

The 24th section of the "Act to Amend the Law of Copyright," 5 & 6 Vict. ch. 45 (Imp.), declares "that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made, in the book of registry of the Stationers Company, of such book, pursuant to this Act: Provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid," etc., etc.

The evidence shews that Francis Parkman, the author of "A Half Century of Conflict," on the 16th June, 1892, made such an entry as the above section requires, in form given by the Act.

There is, unfortunately, no direct judicial decision on the point except that of Mr. Justice Kennedy in *Liverpool General Brokers' Association v. Commercial Press Telegram Bureaux*, [1897] 2 Q.B. 1, who held in most emphatic terms that the assignee of a copyright under the above Act must be registered before he can maintain an action

for its infringement—not following the dictum of Lord Cockburn, C.J., in *Wood v. Boosey*, L.R. 2 Q.B. 340, cited by the plaintiffs; and, so far as I have been able to ascertain, the judgment of Kennedy, J., has not been disturbed. Had there been no decision nor the expression of any opinion by any judicial authority, much less by a Judge of so great eminence as Lord Chief Justice Cockburn, I confess that my own reading of the Act would have led me to the same conclusion as Kennedy, J., arrived at in the case cited; but the reasoning of the Chief Justice has influenced my mind to make further research, and I find that there is other judicial conclusion as well as the opinions of eminent counsel and authors which support the opinion of Kennedy, J. Assuming for the present that I am not bound by the opinion of Kennedy, J., I may consider his reasoning in coming to the conclusion in the case decided by him, and I confess I am impressed with the reasons given by that learned Judge for differing from the Lord Chief Justice. Kennedy, J., at p. 4 says, in reference to *Wood v. Boosey*: “That case was decided by the Lord Chief Justice, and by the rest of the Court, on other and different grounds: but, of course, the opinion of the Chief Justice is entitled to great weight. What he says is: ‘I must say that the result of the discussion has been to cause me very strongly to incline to the opinion that s. 24 of 5 & 6 Vict. c. 45, which requires that the proprietor shall be registered before he shall be entitled to bring an action for the infringement of his copyright, does not apply to the case of an assignee to whom the proprietorship is assigned.’ The Chief Justice states his reasons, the principal of which appears to be the chance of an injustice to the assignee, he having, in the words of the judgment, ‘no power under the statute, either through the means of this Court or any other means that I can see, to enforce the registration of an entry by way of assignment under s. 13.’ With due deference, as the assignee, if the entry of the assignment is not made under s. 13, can, so

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far as I understand the Act, always enter himself on the book of registry as proprietor, I am unable to perceive the reality of the suggested danger of injustice to the assignee."

Now, in the case under consideration, the assignment conveys the "proprietorship and ownership of the works." These several documents are mute as to the copyright, so that, for all that appears by the paper title of the plaintiffs, there may have been no entry at Stationers Hall of the proprietorship of Parkman's works or any of them, in which case the assignee or assignees of the proprietorship, I presume, could make the entry required by the statute. The entry made by Parkman in his lifetime gave him the copyright for the British dominions, which included Canada, etc. The plaintiffs, it appears, are the proprietors by the assignment to them by the executors and trustees of Parkman, and Grace P. Coffin, his only surviving child, and John T. Coolidge junior, executor of Catharine S. Coolidge, a deceased daughter, described in exhibit B, dated 17th August, 1900, of certain of Parkman's works, which included "A Half Century of Conflict."

Kennedy, J., also refers to *Tuck v. Canton* (1882), 51 L.J.N.S.Q.B. 393, which was a case under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. ch. 68), sec. 4 of which is the same as 5 & 6 Vict. ch. 45, as to registration of proprietors of copyright of books, etc. And the latter part of the section is in these words: "And no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

Mathew, J., in regard to this said: "I do not think it necessary to deal with the other questions that have been suggested, whether or not there is necessity for registering any assignment, assuming that there was a registration of the original copyright. That is a difficult question, and one that I should take further time to con-

sider, if I thought it necessary to decide it for the purposes of this case."

Judgment.

Robertson, J.

I think the case of *Weldon v. Dicks*, 10 Ch. D. 247, is of great assistance in coming to a proper conclusion in this case. That was an action to restrain the publication of a book called "Trial and Triumph," and a question among others was raised as to who was the "proprietor" in case the original proprietor had assigned his copyright. At p. 253 Malins, V.-C., says: "Then a doubt is raised as to the fourth column, the 'name and place of abode of the proprietor of the copyright.' It is said that means the original proprietor. I am clearly of opinion that it means nothing of the kind, but that it means the person who is the proprietor at the time the registration takes place. What difference can it make to anybody who the original proprietor was? It may be material to know who the original publisher is, the object being that a person registering may not pass off a fraudulent entry, but, that he shall give the public an opportunity of inquiry of the publisher whether it was a genuine transaction, or whether the date has been fictitiously inserted, and therefore it is required that the name of the original publisher should be given; but it does not mean that the original proprietor, but that the present proprietor should be given. Upon this ground I am of opinion that the registration is perfectly sufficient."

If this is correct, the word "proprietor" in the 24th section of the Act means the person who is the present owner of the work, and the copyright shall be and is to be deemed to be personal estate, etc. And it is as such "proprietor" that the plaintiffs can restrain any other person from importing into any part of the United Kingdom, or into any part of the British dominions, for sale or hire, any printed book, etc., as mentioned in sec. 17 of the Act.

In *Goubaud v. Wallace* (1877), 36 L.T.N.S. 704, there was a demurrer to a statement of defence in an action for

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a breach of copyright. The statement of claim alleged that the plaintiffs were proprietors of the copyright in a book published in parts, and called "Life of the Earl of Beaconsfield," and had, before action brought, entered their proprietorship in the registry of the Stationers Company, as required by 5 & 6 Vict. ch. 45, sec. 24, and that the defendant, being the printer and publisher of the newspaper called the *Morning Advertiser*, infringed the said copyright by publishing portions of the plaintiffs' book in the said newspaper. The material defence was that the plaintiffs had not made the entry required by the statute before the alleged infringement. To this the plaintiffs demurred, on the ground that the entry need not have been made before infringement. It was contended by counsel for the plaintiffs that sec. 24 of the Act threw no burden on the proprietor of a copyright to register before action, and that without express words no such burden could exist. Counsel for the defendants cited *Cussell v. Stiff* (1856), 2 K. & J. 279, *per* Wood, V.-C., 7 & 8 Vict. ch. 12, and argued that the intention of the Legislature was that registration should take place immediately on the copyright being acquired, inasmuch as upon any other construction of the law infringements might take place without any knowledge on the part of the person infringing.

Mellor, J., after expressing himself as being much perplexed by the consideration of the practical difficulties which might arise from giving a literal construction, etc., says: "I am of opinion that under these sections the registration of copyright is merely a condition precedent to the bringing of an action for infringement, and not to the existence of the copyright itself. Registration, in fact, is necessary only to perfect the right to sue, not to create it." Field, J., was of the same opinion, but enters more fully into the statutory law in regard to copyright. It may be said that, as regards registration before action brought, this decision is *obiter*, but it shews what these two

learned Judges thought as to the necessity of registration taking place before action, etc.

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Robertson, J.

Then there is the opinion of Sir James Stephen, Q.C., supported as it is in the report of the Royal Commission presented in 1878, for the investigation of the subject of copyright. In an extract from the report of that commission published in Putnam on Copyright, 2nd ed., at p. 215, I find it stated, paragraph 6: "Our colleague Sir James Stephen has reduced this matter to the form of a digest, which we have annexed to our report, and which we believe to be a correct statement of the law as it stands." Then at p. 200 Sir James Stephen says under Article 24—"Effect of Registration in case of books:"—"No proprietor of copyright in any book can take any proceedings in respect of any infringement of his copyright unless he has before commencing such proceedings caused an entry to be made in the said Register under the last article."

Now, these are almost the words used in the 24th section, and they were written since the dictum of the late Lord Chief Justice Cockburn in *Wood v. Boosey*, and since the judgment in *Goubaud v. Wallace*, creating doubts as to registration.

Apart from the judgment or opinion of any other Judges or the opinion of any author or learned counsel, the conclusion I have come to is, after much thought and consideration, and contrary, I may say, to an impression made on my mind at the close of the argument, that the plaintiffs are not in a position to take this proceeding. I am satisfied that they are the owners, and, as before stated, would have the right to prohibit the importation of foreign reprints into Canada, had they been registered owners. And, with all due respect to the view expressed by the late Lord Chief Justice Cockburn, I cannot see my way to follow him as he has expressed himself in *Wood v. Boosey*, before referred to. The 24th section of 5 & 6 Vict. ch. 45 (Imp.) appears to be plain, that no proprietor of a copyright in any book, which shall be first published after the



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passing of that Act, shall maintain an action or suit, etc., in respect of any infringement of such copyright, unless he, that is, the owner whose copyright has been infringed, shall, before commencing such action, etc., have caused an entry to be made, etc., as required by that section. No one else has a right to complain but the present owner, consequently no one, unless the present owner, has any right of action. The author cannot be meant, nor his legal representatives who are entitled to his estate by devise, bequest, gift, or otherwise, for the reason that neither the author, if he was living, nor his said representatives, can in any sense of the word be "proprietors." The ownership in the work and the copyright passed from them by virtue of the assignment produced at the hearing.

I must confess that I regret that I am forced to this conclusion, as I feel that an infringement has taken place by these defendants, and on that account I will not order the plaintiffs to pay the costs. The motion goes off on what may be called a technicality in which there is no merit—except what the statutes require as a preliminary to bringing an action. The copyright is not, in any way, affected. I am therefore obliged to refuse the injunction, but I do so without costs.

E. B. B.

## [DIVISIONAL COURT.]

SHERA

V.

THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LTD.

*Insurance—Accident Insurance—“ ‘ Immediately ’ . . . Disable ”—  
Causation or Time—Notice—Condition Precedent.*

The defendants insured the plaintiff against accident by a policy containing a clause that if “accidental injuries . . . shall immediately, continuously and wholly disable and prevent the assured from pursuing his usual business or occupation,” etc., they would pay a certain weekly allowance during a limited period.

The plaintiff was injured accidentally within the meaning of the policy, but did not become wholly disabled until three months after, when he notified the company :—

*Held*, that the word “immediately” in the clause had relation to causation and not to time, and that plaintiff was entitled to recover. *Williams v. The Preferred Mutual Accident Ass’n.* (1893), 91 Georgia 698; *Merrill v. The Travellers Insurance Co.* (1895), 91 Wis. 329, distinguished.

The policy also contained a clause that written notice must be immediately given to the company at the office in Montreal . . . and “that if in any other respect the conditions of this insurance are disregarded all rights hereunder are forfeited to the corporation” :—

*Held*, that the giving of notice forthwith was not thereby made a condition precedent to the right of recovery on the policy.

THIS was an appeal from a judgment of the District Court of the Provisional Judicial District of Thunder Bay in an action for damages for an injury sustained by the plaintiff in being thrown from a load of wood.

Statement.

The accident happened on the 11th of April, 1899, but the injury was not of such a character as to disable the plaintiff until about the 9th of July following, and he did not apply to the company for the insurance until the 11th of August, when he applied by letter. In answer to his letter the company sent him forms of claim to be filled out which were filled up and returned to them, with a report of a surgeon, about the 16th of September.

In the policy under which he was insured were contained the following clauses :—

1. Against accidental injuries received by the assured while riding in any conveyance or vehicle, propelled by

## Statement.

steam, electricity, cable or *horse power*, in consequence of an accident that shall injure the conveyance in which he is riding, and not otherwise, in the sum of *fifteen hundred dollars*, in the event of death resulting in thirty days from such accidental injuries solely and independently of all other causes. Or if such accidental injuries shall not cause death, but shall immediately, continuously and wholly disable and prevent the assured from pursuing his usual business or occupation, or attending to any business affairs whatsoever, the corporation will pay assured *fifteen dollars* per week during the continuance of such disability for a period not exceeding *ten* consecutive weeks.

2. Or if the assured shall sustain accidental bodily injuries while riding upon a bicycle, and such injuries shall be caused solely and directly by reason of a collision with any conveyance, the corporation will pay the assured *fifteen dollars* per week during the continuance of total disability for a period not exceeding *ten* consecutive weeks.

6. Written notice of accident must be given immediately to the general managers of the corporation for Canada, at their office in Montreal, with particulars and names of witnesses. Proof of claim must be made within two months after death or end of disability. Suit on any claim must be brought within twelve months from date of accident. Any medical adviser of the corporation may examine the person or body of the assured in respect of any alleged injury. No recovery can be had under more than one provision of this policy. Not more than one policy of this form will be issued to one person. If, notwithstanding this rule and the notice of it herewith given, more than one such policy is obtained, or if in any other respect the conditions of this insurance are disregarded, all rights hereunder will be forfeited to the corporation. No agent has authority to change or waive any of the terms

of this policy. Not valid unless countersigned by an agent of the *International Registry Company*. Statement.

The action was tried at Port Arthur, on the 15th of May, 1900, before His Honour Judge FITZGERALD and a jury.

*F. H. Keefer*, for the plaintiff.

*T. A. Gorham*, for the defendants.

The Judge charged the jury that they were to find whether the plaintiff was by his injury "immediately, continuously and wholly disabled," etc., and whether "immediate" notice of the accident was given, defining "immediate" as with due diligence under the circumstances of the case; and the jury brought in a verdict of \$150.

Against this verdict the defendants moved, and the motion was heard on October 11th, 1900, before a Divisional Court composed of BOYD, C., FERGUSON and ROBERTSON, JJ.

*Wallace Nesbitt*, Q.C., for the appeal. The plaintiff did not cease his ordinary work until July 9th, although he claims he was injured on April 7th. He does not come within the terms of the policy where it is provided that the injury shall "immediately . . . disable . . . the assured." That question should not have been left to the jury, and there should have been a nonsuit or a judgment for the defendants: *Williams v. The Preferred Mutual Accident Ass'n.* (1893), 91 Georgia 698; *Merrill v. The Travellers' Insurance Co.* (1895), 91 Wis. 329; Thompson on Trials, secs. 1065, 1067; 16 Am. & Eng. Ency., 2nd ed., p. 862. The notice is a condition precedent, and was not "immediate": *Stoneham v. The Ocean, Railway, etc., Co.* (1887), 19 Q.B.D. 237; *Wythe v. Manufacturers' Accident Ins. Co.* (1894), 26 O.R. 153;

**Argument.** *Employers Liability Assurance Corporation v. Taylor* (1898), 29 S.C.R. 104; *The Accident Ins. Co. of North America v. Young* (1891), 20 S.C.R. 280.

*J. H. Moss*, contra. The word "immediate" in the first clause of the policy refers to causation, and not to time. It means without the intervention of any other cause: Century dictionary. "Immediate" means "direct." The word "immediately" does not refer to the order of time any more than the word "proximate" in *The Accident Ins. Co. of North America v. Young* (1891), 20 S.C.R. at p. 295. The question of notice being given under clause 6 of the policy within a reasonable time is a question for the jury, and was left to them. The giving of notice was not a condition precedent to the right of recovery on the policy; *McFarland v. United States Mutual Accident Ass'n.* (1894), 124 Mo. at p. 218; *Peoples' M. Accident Ass'n. v. Smith* (1889), 126 Penn. 317; "Immediate" in Bouvier's Law Dictionary.

December 12th, 1900. BOYD, C. :—

On the 11th of August, 1899, the plaintiff gave notice by letter to the defendants that he had been thrown from his sleigh and hurt his knee on the 7th of April of that year. While painful at times it did not cause him serious trouble till five weeks before his writing; then it developed into a swelling of the joint that completely disabled him, so that he was unable to attend to business. And he asks for a remittance pursuant to the terms of his policy. He had left his policy at Winnipeg, and was then in Atlin district, where he had been hurt. Hurt on the 7th of April, he became disabled about the 9th of July, and made no complaint to, and had no intention of claiming from, the company till then.

In response to his letter of the 11th of August the plaintiff received a form of claim to fill out and forward, and this he did within a few days thereafter. Proof of

claim is dated the 15th of September, and a report of the surgeon, dated the 16th of September, was also sent. The company afterwards wrote the plaintiff at Vancouver, where he had gone for treatment, and refused to pay because proof of claim had not been sent in time. The plaintiff's account as to the hurt was corroborated by another witness, and no evidence was given for the defendants.

Judgment.

Boyd, C.

The jury gave a verdict for \$150 damages to plaintiff, after certain objections had been raised and overruled by the Judge. The motion is now to enter a nonsuit, and was urged on two grounds—(1) that notice of the accident was not given immediately to the company, and (2) that the plaintiff had not been immediately disabled by the injury.

These objections are grounded on the terms of the policy, No. 1 and No. 6. (Set out above.)

The point made on the accident itself was that the injury was not "immediate," so that disablement did not follow for some months, and the policy did not cover such a case. That rests upon the meaning of "immediately"—whether it is used in reference to time or in reference to cause or causation.

It cannot be said that the language and the context is free from ambiguity, but if so, the more beneficial meaning may be invoked by the insured: *Hooper v. The Accidental Death Ins. Co.* (1860), 5 H. & N. at p. 557. I think the word is to be read as synonymous with kindred expressions used before and after the word "immediately" in the first and second paragraphs of the policy. These are, "if death results from such injuries solely and independently of all other causes," and "injuries caused solely and directly by reason of a collision." These words, "*independently* of all other causes," and "*directly*" may colour the intermediate use of "*immediately*," so as to give rise to the honest interpretation of it as referring to "*immediate*" or direct cause, independently of all other injuries than the accident. I am not disposed to disturb the verdict on this ground of objection.

Judgment.

Boyd, C.

Nor on the other ; for the giving of notice forthwith is not made, in terms or by fair implication, a condition precedent. The company shewed its own appraisalment of the situation and apparent delay by sending blank notices and proofs of loss to be supplied by the applicant for relief ; and that is not without significance, in the absence of all explanatory evidence.

The sixth paragraph of the policy is set out above.

To read the clause "if in any other respect the conditions of this insurance, being material to the contract, are disregarded, all rights hereunder will be forfeited to the corporation" as including failure to send immediate notice, appears to me to be overweighting it with meaning. A clause working forfeiture must be strictly construed, and its precise scope should not be left to conjecture. What is meant, and how much is covered, by the words "conditions . . . material to the contract"? Who is to determine the materiality? If the company, they did not elect to forfeit, but called for proof. If the jury, their finding is conclusive. Having regard to the vague text of the policy the case of *Stoneham v. The Ocean Railway, etc., Co.* (1887), 19 Q.B.D. 237 is more pertinent as an authority in this litigation than the *Employers Liability Assurance Corporation v. Taylor* (1898), 29 S.C.R. 104.

The American cases relied on by the appellant are plainly distinguishable from the present. In *Merrill v. The Travellers' Ins. Co.* (1895), 91 Wis. at page 332, the injury insured against was one which "*independently* of all other causes (should) *immediately* and wholly disable." There, manifestly, "*immediately*" was not to be read as tautological with "*independently*." Each word had to carry its own significance. The like reason arising from a like context was the cause of the decision in *Williams v. The Preferred Mutual Accident Ass'n.* (1893), 91 Georgia, at p. 700.

The judgment should be affirmed with costs.

FERGUSON, J.:—

Judgment.

Ferguson, J.

The matter that was the chief one in contention before us arose upon the construction of a clause in the policy which is: "Or if such accidental injuries shall not cause death, but shall immediately, continuously and wholly disable and prevent the assured from pursuing his usual business or occupation, or attending to any business affairs whatsoever, the corporation will pay," etc.

The accident happened to the plaintiff in the month of April. The total disability did not occur till the month of July following. It was an injury to the plaintiff's knee, which did not culminate in a serious matter for about this period of three months. It was not, however, contended or suggested that there was any other or intervening cause of the disability, or that the accident to the plaintiff was not the proximate cause of it.

In the case *Williams v. The Preferred Mutual Accident Ass'n.* 91 Georgia 698, the words "immediately, wholly, and continuously disable" were considered and held to have relation to time and not causation, but they were there preceded by the words "independently of all other causes," and this fact seems to have been the turning point in the decision.

In the case *Merrill v. The Travellers' Insurance Co.* 91 Wis. 329, the policy had been drawn in the same way. The opinion was the same, and apparently upon the same reasoning.

In the policy in the present case the clause preceding this one, and having relation to the death of the assured, the draftsman employs the words "and independently of all other causes," which are not found in the clause in contention, and in a subsequent clause in the policy words similar in import are also found.

I am willing to say that at first I had grave doubts upon the subject, but after the best consideration I have been able to bestow upon it, I have arrived at



Judgment.

Ferguson, J.

the conclusion that the word "immediate" used in this clause of the policy has relation to causation and not to time. However this may really be, I think it entirely safe to say that this view is as reasonable as the other one. And in such a case the general rule seems to be that the construction which is most favourable to the insured should be adopted. As it is the company that prepares the contract, the insured not being consulted as to the form thereof, all doubts with regard to its meaning must be solved against the company: 16 Am. & Eng. Ency. of Law, 2nd ed., p. 863.

This clause must, I think, be solved and construed in favour of the plaintiff's contention.

In all other matters the subject of contention before us I agree with the judgment of the Chancellor.

ROBERTSON, J.: I concur.

G. A. R.

## [DIVISIONAL COURT.]

## KREUTZIGER V. BROX.

*Division Courts—Jurisdiction—Balance due on contract signed by defendant—Extrinsic evidence.*

In an action in the County Court for \$37.50, balance due on a building contract of \$475, signed by the defendant, where extrinsic evidence was required to shew performance of the contract by the plaintiff, and for an open account for \$27.35, and in which the defendant was allowed \$25.00 for defective work and material:—

*Held*, that the Division Court had no jurisdiction, and that the plaintiff was entitled to his costs on the County Court scale. *Kinney v. Roche* (1881), 8 P.R. 515, approved of; *McDermid v. McDermid* (1888), 15 A.R. 287, followed; *Re Graham v. Tomlinson* (1888), 12 P.R. 367, not followed.

Statement.

THIS was an appeal from the County Court of the County of Waterloo in an action brought to recover the sum of \$64.85; \$37.50 thereof being the balance due on a

building contract amounting to \$475, which was signed by the parties, and \$27.35 being the amount of an open account for goods sold and delivered.

Statement.

The defendant set up as a "statement of defence and counter-claim" non-performance of the work and delivery of defective material.

The action was tried on the 14th day of December, 1899, before His Honour Judge CHISHOLM and a jury.

A verdict was rendered for the sum of \$60.95 in favour of the plaintiff, and the defendant was allowed the sum of \$25. The County Judge held that there was jurisdiction in the Division Court for the plaintiff's claim, and that the defendant's defence did not constitute a counter-claim and gave the plaintiff Division Court costs, and the defendant County Court costs with the right to set-off against the plaintiff's costs and claim.

From this judgment as to costs the plaintiff appealed to the Divisional Court, and the appeal was argued on the 12th of October, 1900, before BOYD, C., FERGUSON, and ROBERTSON, JJ.

*J. C. Haight*, for the plaintiff. The plaintiff is entitled to County Court costs and no set-off should be allowed; for the Division Court would not have jurisdiction to try the action. The contract did not fix the amount as being due or owing; in order to establish a debt owing by the defendant, proof had to be given that the work had been done. I refer to *Kinsey v. Roche* (1881), 8 P.R. 515; *Wiltie v. Ward* (1883), 8 A.R. 549; *McDermid v. McDermid* (1888), 15 A.R. 287, overruling *Re Graham v. Tomlinson* (1888), 12 P.R. 367; *Forfar v. Climie* (1883), 10 P.R. 90; and other cases supporting this view, collected in *Bicknell & Seager*, pp. 87-88.

*W. M. Reade* contra. The whole cause of action was \$64.85. The evidence shews that payments were made on the building contract and a balance of \$37.50 left, which,

## Argument.

with the separate open account of \$27.35, amounted to the \$64.85. The Judge has found the payments were made on the contract: *Bank of Ottawa v. McLaughlin* (1883), 8 A.R. 543; the contract price was the amount ascertained by the signature of the defendant: *Re Sawyer Massey Co. and Parkin* (1897), 28 O.R. 662; *Petrie v. Machan* (1897), 28 O.R. 642; *Sanderson v. Ashfield* (1889), 13 P.R. 230; *Coughlin v. Hollingsworth* (1884), 5 O.R. 207.

*Haight*, in reply.

December 12th, 1900. BOYD, C. :—

*Kinsey v. Roche* (1881), 8 P.R. 515 lays down the principle of construction for the word "ascertained" as now found in the Division Court Act, sec. 72, 1 (d). The amount of the claim is ascertained by the signature of the defendant if it is thereby *made certain*, i.e., if upon proof of the signature the liability is established. If other and extrinsic evidence is required, such as to shew completion of the contract—in the case of a signed building contract to pay so much for a house—the stipulated price is not ascertained by the mere evidence of contract. The jurisdiction of the Division Court is extended to cases where the balance claimed on such an ascertained amount does not exceed \$200, but it was not intended in such cases to throw open in the lower forum disputed matters as to the proper completion of the contract—the due fulfilment of all conditions and the like. Such I take to be the meaning of all the cases that have proceeded upon the doctrine of *Kinsey v. Roche*.

In *Re Graham v. Tomlinson* (1888), 12 P.R. 367, a different meaning was attributed to the word "ascertained," and cases proceeding upon that ruling would warrant the inclusion of contracts to build for so much within the scope of the Division Court jurisdiction. The more limited construction is supported by the great weight of authority, and by the decision of the Court of Appeal, which should be sufficient to control the action of the Divisional Courts.

That is apparent from *McDermid v. McDermid* (1888), 15 A.R. 287, in which discredit was cast upon *Graham v. Tomlinson*, and *Kinsey v. Roche* was re-established.

Judgment.

Boyd. C.

This view of the conflicting decisions was at the outset taken in *Moses v. Moses* (1889), 13 P.R. 12, and by the Chancery Divisional Court, 13 P.R. 144, and later on by the Common Pleas Division in *Trimble v. Miller* (1892), 22 O.R. at p. 502. The cases by individual judges—*In re Wallace v. Virtue* (1894), 24 O.R. 558, and *Re Shepherd and Cooper* (1894), 25 O.R. 274—are in accord with *Kinsey v. Roche*.

The Queen's Bench Divisional Court in *Re Sawyer Massey Co. v. Parkin* (1897), 28 O.R. 662 have reverted to the doctrine of *Graham v. Tomlinson*, but that is no reason why we should undertake to disregard the uniform trend of decisions for so many years observed in the reported cases.

I may note that before *Kinsey v. Roche* the same exposition of the Division Court Act was made by a very careful Judge, whose decision in *Wiltzie v. Ward* (1883), 8 A.R. 549, is of great weight.

There was no jurisdiction in the present case to try the action in the Division Court, and judgment should be entered for the plaintiff for the balance, after deducting the damages from the verdict, and County Court costs.

Owing to the conflicting cases, this appeal, twice argued, should be without costs.

FERGUSON, J., concurred in the judgment of the Chancellor.

ROBERTSON, J. adhered to his judgment in *Re Sawyer Massey Co. v. Parkin* (1897), 28 O.R. 662, and also concurred.

G. A. B.

## [DIVISIONAL COURT.]

## BUTLER V. McMICKEN.

*Judgment—Action on—Period of Limitation—Renewal of Writ—Order nunc pro tunc—Jurisdiction—New Evidence on Appeal—R.S.O. 1877, ch. 108, sec. 23—R.S.O. 1897, ch. 133, sec. 23.*

Notwithstanding R.S.O. 1877, ch. 108, sec. 23 (see R.S.O. 1897, ch. 133, sec. 23) twenty years is the period of limitation applicable to an action on a judgment of a court of record.

*Boice v. O'Loane* (1878), 3 A.R. 167, and cases following it, followed in preference to *Jay v. Johnston*, [1893] 1 Q.B. 25, 189.

*Trimble v. Hill* (1879), 5 App. Cas. 342, at p. 344, specially considered. The renewal of a writ of summons after its expiration is matter of judicial discretion, and when a county court Judge had so renewed such a writ as to defeat the operation of the Statute of Limitations, and the defendant made no attempt to appeal from his order, but appeared to the writ without objection, a Divisional Court, on appeal from judgment in the action, refused to entertain an objection to the validity of the writ.

Under Rule 498 the Court may entertain an application to admit new evidence in a proper case on a county court appeal, notwithstanding R.S.O. ch. 55, sec. 51, sub-sec. 3, under which such an application must be made before the county court, and this although the time for applying for a new trial had expired.

## Statement.

APPEAL from the county court of the county of Huron by the defendant McMicken.

This action was brought upon a judgment recovered in the county court of the county of Huron on November 15th, 1877.

The writ of summons in the present action was issued on November 12th, 1897; it was renewed for one year from its issue by an order of the county Judge, dated November 9th, 1898. The writ, along with a statement of claim, was served on the defendant McMicken on November 2nd, 1899, but out of the jurisdiction, i.e., in London, England. The writ not having been issued as a writ for service out of the jurisdiction, the defendant applied to set aside the service upon him upon that ground; and by an order made on January 30th, 1900, upon notice to the defendant and upon reading the affidavits and papers filed, the Judge of the county court set aside the service of the writ and statement of claim,

Statement.

but by the same order gave leave to the plaintiff to renew the writ of summons, *nunc pro tunc*, as of November 8th, 1899, for one year, and to issue a concurrent writ for service on a British subject out of the jurisdiction, and to serve it along with the statement of claim upon the defendant's solicitors, and ordered the defendant to appear and file his statement of defence within six weeks from service on his solicitors. The plaintiff accordingly amended the original writ as of November 8th, 1899, and issued and served a concurrent writ and statement of claim to which the defendant duly appeared and filed his statement of defence. In this he set up that the claim was barred by the Statute of Limitations, and that the order of January 30th, 1900, allowing the amendment of the writ, was made without jurisdiction; also, that he had obtained a discharge of the debt in 1881 under the Insolvent Act then in force in Canada.

No evidence of any discharge under the Insolvent Act was offered at the trial, and the learned county court Judge ordered judgment to be entered for the plaintiff.

From this judgment the defendant McMicken appealed, and his appeal was argued on November 9th, 1900, before the Divisional Court (FALCONBRIDGE, C.J., and STREET, J.).

*J. M. Clark*, Q.C., for the appellant, contended that the claim was barred even if the period of limitation was twenty years; that the county court Judge had no power to authorize renewal of the writ of summons *nunc pro tunc* after the claim was barred by lapse of time: Cons. Rule, 132; *Doyle v. Kaufman* (1877), 3 Q.B.D. 7; S.C. in appeal, *ib.* at p. 340; *Howland & Co. v. The Dominion Bank* (1893), 22 S.C.R. 130; *Canadian Bank of Commerce v. Perran* (1899), 31 O.R. 116; that the claim became barred after the lapse of ten years: R.S.O. 1877, ch. 108, sec. 23; *Jay v. Johnstone*, [1893] 1 Q.B. 25, 189; *Trimble v. Hill* (1879), 5 App. Cas. 342, at p. 344; that

Argument.

*Boice v. O'Loane* (1878), 3 A.R. 167, must clearly be considered over-ruled.

*Garrow, Q.C.*, for the plaintiff, contended that the Judge had discretionary power to do as he had done; that the proceeding was an interlocutory one from which there was no appeal; that the period of limitation on a judgment was twenty years in this province: *Boice v. O'Loane, supra*; *Allison v. Breen* (1900), 19 P.R. 143; *Mason v. Johnston* (1893), 20 A.R. 412; that when the Court of highest resort in a colony has settled the construction of a statute, a subsequent decision on a similar enactment by the Court of Appeal in England will not affect the colonial decision.

*Clark*, in reply.

Counsel for the defendant McMicken produced upon the argument an exemplification of a discharge under the Insolvent Act of 1875, granted in Winnipeg in 1881, with an affidavit that he had been unable, until after the time for applying to the county court for a new trial, to discover where this discharge had been granted or to obtain evidence as to it.

November 26th, 1900. The judgment of the Court was delivered by

STREET, J. :—

[After stating the facts as above:]

The first ground relied on by the appellant was that the right of action upon the judgment sued on was barred at the end of ten years from the date of its recovery, under sec. 23 of ch. 108, R.S.O. 1877,\* and the English case

\*R.S.O. 1877, ch. 108, sec. 23: No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same unless in the meantime some part of the principal money or some interest thereon,

of *Jay v. Johnstone*, [1893] 1 Q.B. 25 and 189, was referred to.

Judgment.

Street, J.

We are governed, however, by the original decision of our own Court of Appeal in *Boice v. O'Loane*, 3 A.R. 167, and the later cases following it, including *Mason v. Johnston*, 20 A.R. 412, and *Allison v. Breen*, 19 P.R. 143, and must hold that twenty years, and not ten, is the period of limitation applicable to an action upon the judgment of a court of record.

The second ground is that the writ of summons was not served within one year from its issue, and had never been properly renewed, but expired before service thereof was effected, and the plaintiff's cause of action, if any, was thereby barred.

The writ of summons must be taken to have been in force on November 2nd, 1899, when it was personally served upon the defendant McMicken in London, England. That service, however, was irregular because no order allowing service out of the jurisdiction and fixing a time for appearance had been obtained. The defendant applied to the Judge of the county court to set aside the service on account of this irregularity, and the application was granted, but was coupled with an order, made on notice to the defendant and upon the affidavits filed, that the writ should be renewed as of a date before it had expired. To the writ so renewed the defendant appeared, and to the statement of claim served with it he pleaded. He pleads, amongst other things, that the writ of summons in the has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person by whom the same is payable, or his agent, to the person entitled thereto or his agent: and in such case no action or suit or proceeding shall be brought, but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was made or given.

R.S.O. 1897, ch. 133, sec. 23: No action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent, or to recover any legacy but within ten years [etc., as in R.S.O. 1877, ch. 108, sec. 23].—REP.



Judgment.

Street, J.

action had expired and was a nullity when served upon him. In my opinion we cannot at this stage entertain an objection to the validity of the writ, which is the foundation of the action and to which the defendant has appeared without objection.

The question whether a writ should be renewed after it has expired is a matter of practice resting in the judicial discretion of the Judge, and where, as here, that discretion has been exercised, and no appeal is provided, or none has been attempted, the order is binding, and we cannot discuss the propriety of it: *Sears v. Meyers* (1893), 15 P.R. 381; *St. Louis v. O'Callaghan* (1889), 13 P.R. 322; *Cuirns v. Airth* (1894), 16 P.R. 100; *Doyle v. Kaufman*, 3 Q.B.D. 7, 340; *Smalpage v. Tonge* (1886), 17 Q.B.D. 644; *Hewett v. Barr*, [1891] 1 Q.B. 98. The writ of summons must, therefore, be taken to have been issued before the claim had been barred by the statute, and to have been properly renewed and served, and the second ground of appeal cannot be sustained.

The defendant McMicken produced upon the argument a certified copy of a discharge under the Insolvent Act of 1875 and amending Acts, granted in 1881 by the Court of Queen's Bench at Winnipeg to the defendant McMicken upon his petition and not upon any deed or consent of creditors. Accompanying this was an affidavit of his solicitor that he had been unable to ascertain, until after the trial and after the time for moving in the county court for a new trial, where this discharge had been obtained, although he had searched in various public offices to discover it. Upon this material he asks that the judgment of the Court below may be set aside and a judgment entered in his favour, or that a new trial may be ordered.

This is practically an application for a new trial upon the ground of the discovery of evidence, and under subsec. 3 of sec. 51 of the County Courts Act, R.S.O. ch. 55, such an application must be made to the county court,

and does not properly form the subject of an appeal to a Divisional Court. In the present case the affidavit shews that the evidence was not discovered, in spite of due diligence, until after the time for applying for a new trial in the county court had expired.

If the defendant McMicken really obtained a valid discharge of the debt sued for, it would be wrong that he should be prevented from obtaining the benefit of it by reason of the fact that the nineteen years which have passed since the discharge was granted have obscured the record of it.

Application was made to us at the argument of the appeal to permit evidence of the discharge to be put in before us.

I think that Rule 498\* is wide enough to allow of our doing this in a county court appeal, and the circumstances of the case disclose, in my opinion, such special grounds as to justify us in granting to the defendant McMicken special leave to adduce evidence in support of the particular defence set up. The mere production of the order of discharge is by no means sufficient. Its effect is limited by sec. 61 of the Act of 1875: see *Sanderson v. Dixon* (1878), 29 C.P. 377. It will be necessary that evidence should be produced of all facts necessary to shew

\*Rule 498 (1) In all appeals either to the Court of Appeal or to the High Court or a Judge, or hearings in the nature of appeal, and on all motions to set aside a verdict or finding of a jury, and to set aside or vary a judgment, the Court or Judge appealed to shall have all the powers and duties as to amendment and otherwise of the Court, Judge or officer appealed from, and full discretionary power to receive further evidence upon questions of fact; such evidence to be either by oral examination before the Court or Judge appealed to, or as may be directed.

(2) Such further evidence may be given without special leave as to matters which have occurred after the date of the judgment order or decision from which the appeal is brought.

(3) Upon appeals from a judgment order or decision given upon the merits at the trial or hearing of any cause or matter, such further evidence (save as aforesaid), shall be admitted on special grounds only, and not without the special leave of the Court.]—*REP.*

Judgment.

Street. J.

Judgment.

Street, J.

that the discharge is a valid one and is binding upon the plaintiff.

Upon payment to the plaintiff within four weeks after taxation of the costs of the former trial and of the present appeal, we will appoint a time, upon the application of the defendant McMicken, to receive such further evidence as the defendant McMicken may desire to adduce as evidence of his discharge, and as the plaintiff may desire to offer in reply. The manner in which the evidence is to be taken, whether by affidavit, by commission, or orally before us, will be determined when the appointment is made. In the event of the costs not being paid within the time named, or of no appointment being applied for by the defendant McMicken for the hearing of further evidence within ten days after such payment, if made, the appeal will be dismissed with costs.

A. H. F. L.

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GENTLES V. CANADA PERMANENT AND WESTERN CANADA  
MORTGAGE CORPORATION.

*Mortgage—Sale under Power—Tender of Redemption Money—Time and Place of—Reasonable Tender.*

The defendants advertised an auction sale of mortgaged lands situate near Kincardine to take place there on January 19th. At eleven a.m. on January 17th the mortgagor telegraphed to the defendants at Toronto to inquire the amount required to redeem it and the defendants telegraphed a reply. At ten a.m. on January 19th the defendants received at Toronto the amount named, but in accordance with their office procedure, the accountant was not aware of this till about eleven a.m., when knowing the property was up for sale, he telegraphed and telephoned the fact to Kincardine. The sale had, however, been made a few minutes before to the plaintiff. The defendants then returned the money to the mortgagor :—

*Held*, that the plaintiff was entitled to specific performance, for the mortgagor had not tendered the amount such reasonable time before the sale as to make it obligatory on the defendants to receive it in payment.

Statement.

THIS was an action tried at the Walkerton non-jury sittings on November 28th, 1900, before STREET, J.

Statement.

The defendants, under the power of sale in a mortgage from one Gilchrist, advertised a sale of the lands at Kincardine in the vicinity of which the mortgaged lands were, for January 19th, 1900. On January 17th Gilchrist telegraphed the company as follows:—"What amount will pay mortgage to-morrow? will mail cheque to-day; answer," to which the company telegraphed in reply, giving the amount. Some days previously the company's inspector having charge of the sale had left Toronto to attend to a series of mortgage sales in several places, and had this one on his list. He arrived at Kincardine on the morning of the sale, and at eleven o'clock, the hour advertised, made preparations for it by engaging the auctioneer, who was present, and by reading the conditions of sale. There was then some bidding and the property was knocked down to the plaintiff, who was declared to be the purchaser. The plaintiff also signed a formal contract to purchase. No one was present on behalf of the mortgagor. A few minutes afterwards the inspector was called to the telephone, where he received a message from the company's office that a cheque for the amount of the mortgage money had been received at the company's office, whereupon the inspector replied that the property had been sold. Shortly afterwards he received a telegram from the company, advising of the receipt of a cheque for the mortgage money.

At the company's head office in Toronto a registered letter, containing the above mentioned cheque, arrived shortly after ten o'clock in the morning of the 19th, and in accordance with the procedure adopted in respect to moneys received by the company, did not come to the accountant's attention until about an hour later, when the accountant, who by chance knew that the matter was in the sales department, communicated with the head of that department, who thereupon sent off the telegram and also called up the inspector by telephone, with the above result. The money was not applied, but was returned to

Statement.

the mortgagor. The mortgagor thereupon gave notice to the company that he claimed to have redeemed, and he forbade them to carry out the sale. The company communicated this to the plaintiff, and stated to him that under the circumstances, and to protect the mortgagor as much as possible, they would not carry out the sale unless forced to do so by the Court. The plaintiff thereupon brought action for specific performance, and the defendants pleaded the above facts amongst others. At the trial the contract was proved and the defendants gave evidence of the above facts.

*J. H. Moss*, for the plaintiff.

*Monro Grier*, for the defendants.

At the close of the case the following judgment was delivered.

STREET, J.:—

This is a matter with regard to which one must take a reasonable view. The cause of the trouble has been that Gilchrist did not go to the sale himself and tender the money there, or go with something to shew that the money had been tendered.

It is a case of a mortgagee living at a distance from the place of sale. The mortgage is in arrear and the land is advertised for sale. Surely he is not bound to accept money tendered to him where he lives at the very hour, or within a few minutes of the hour at which the sale is to take place a long way off. He is not bound to put off the sale or hold the sale where he lives. He is bound to hold it where it is most advantageous to the mortgagor, and he is doing quite right in selling the property up there; and the mortgagor is bound to tender the money within a reasonable time before the sale comes off. I think the mortgagee, under these circumstances, would be quite justified in saying: "I'll not receive this money; I am willing to take it and put it to one side till I hear

whether the sale has taken place, and I will stop the sale if I can," but that is the most that he can be expected to do.

There must be judgment for specific performance of the contract, and for the costs of the action.

A. H. F. L.

Judgment.

Street, J.

### REYNOLDS V. PALMER.

*Will—Husband and Wife—Dower—Election—Ignorantia Juris.*

A testator left his wife all his personal estate absolutely, and all his real estate for life or widowhood, subject to which he devised "my said real estate" in specific parcels to his sons, and died in 1889. After his death his widow, who knew the will, remained in possession of the house, to which she built an addition, and sold some of the timber, rented the land on shares for two seasons, supporting the children, and married again in 1891. In 1893 she and her husband took a lease of the property from the executors to expire in 1899, when the eldest son came of age. His parcel was conveyed to him by the executors, who then granted a new lease, still current, of the rest of the land to the second husband:—

*Held*, that the widow was put by the will to her election:—

*Held*, also, that though there was no positive evidence that the widow knew she had a right to elect between the will and her dower, yet on the principle *ignorantia juris neminem excusat* she must be held to have elected in favour of the will.

THIS was an action brought to recover dower under the circumstances set out in the judgment of STREET, J., before whom it was tried, at Sandwich, on December 3rd, 1900.

Statement.

*F. D. Davis*, for the plaintiff, cited *Brabant v. Lalonde* (1895), 26 O.R. 379, on the point that there could be no election without knowledge of rights.

*M. Wilson*, Q.C., for the adult defendants, cited *Ripley v. Ripley* (1881), 28 Gr. 610; *Marriott v. McKay* (1891), 22 O.R. 320; *Westacott v. Cockerline* (1867), 13 Gr. 79; *Cameron on Dower*, pp. 375, 484.

*H. D. W. Ellis*, for the infant defendant.

Judgment.

December 10th, 1900. STREET, J. :—

Street, J.

The plaintiff is the widow of Ambrose Palmer, who died on the 21st of April, 1889. At the time of his death he owned the farm of 50 acres on which he lived, and an adjoining parcel of 33½ acres, both being unencumbered. He also left six children by the plaintiff, three being boys and three girls. Charles, the eldest boy, was then about eleven years of age; Walter, the next, was eight years of age, and Armand, the youngest, was four. By his will the testator devised to the plaintiff all his real estate for her life, but so long only as she should remain his widow; and he bequeathed to her all his personal estate absolutely. Subject to the devise to his wife, he devised his "said real estate in manner following, that is to say," and he then proceeded to devise to each of his sons a specifically described parcel of his land. After the testator's death the plaintiff remained in possession of the house and supported the children. She was aware of the terms of the will, and rented the land on shares from year to year for two seasons. She expended \$400 during that time of her own money in building an addition to the house upon the 50 acres; and she sold some 15 or 20 cords of bass wood bolts off it. In January, 1891, she was married to her present husband, with whom she continued to live upon the property and to farm it. In June, 1893, one of the executors, who is the plaintiff's brother, told her that under the terms of the will her right to the property came to an end from the time of her second marriage, and that the executors were advised that, to protect themselves, they must lease the place; and a lease was offered to her and her second husband upon the terms of their supporting and educating the three sons, who owned the land. She thereupon went to Chatham with the executors to the office of the solicitor who had advised them in the matter. He told her that her life interest under the will had come to an end upon her second marriage, but said nothing to her as to her right to

dower. That right, in fact, never seems to have been mentioned from first to last until the present action was brought. A lease was then made by the executors, who held the legal estate under the Devolution of Estates Act, to her husband and herself of the whole property for a term expiring when Charles should come of age, at the annual rent of \$100, which was to be considered as satisfied each year that the lessees should have supported the children. This lease was executed by the executors and by the plaintiff and her husband, and the lessees then continued during its duration to support the children, and a receipt for the rent was endorsed each year upon it. Upon Charles attaining the age of 21 years he became entitled to the 33½ acre parcel under the will; it was conveyed to him by the executors, and he reconveyed it to John Palmer, who was one of them. A new lease was then made on the 20th of December, 1899, by the executors to the plaintiff's husband of the remaining 50 acres at \$75 a year, with the plaintiff's concurrence, and she and her husband are still in possession under this lease. During the currency of the first lease the executors, with the concurrence of the plaintiff, sold timber off the 33½ acres, which produced a net sum of \$700. This sum, with accrued interest on it, was paid over to Charles when he came of age with the plaintiff's concurrence. The two questions which arise are, first, whether the plaintiff was put to her election by the terms of the will: and, second, whether she must be held to have elected.

Upon the first question I think there can be no doubt. Had the devise to her for life been merely a devise of all his real estate without anything to shew whether by that form of words he intended to dispose of only that which he had the right to give, namely, his property subject to, and not clear of, his widow's dower, there would have been room for argument. But here, in the subsequent clauses of the will, he defines his meaning by specifying particularly what he intends to include in the preceding

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Street, J.

devise to his widow, and the case is brought well within the authority of *Westacott v. Cockerline*, 13 Gr. 79.

Upon the other question, viz., as to the effect of what has been done by the plaintiff since the death of her husband, I have had more doubt. There can be no question but that the acceptance of a lease of the whole property and agreeing to pay rent for it, and the subsequent assent to the acceptance by her second husband of a further lease, under which he and she are now in possession of the whole property, and her expenditure of her own money in substantial additions to the dwelling house, are all acts which are inconsistent with an intention to claim dower in the property, and are, therefore, equivalent to a declaration in favour of the gifts in the will as against the right to dower. My hesitation has only arisen from a doubt as to whether an election should be presumed, even from acts such as these, in the absence of any positive evidence from which I could find that the plaintiff, with the knowledge that she had a right to choose between the two estates, had made her choice in favour of the estate devised to her. If she was aware that she had a right to dower in the land without reference to the will, then, I think, she must be held to have made this choice in favour of the will, for she says that when she built the addition to the house she had no intention of marrying a second time, and, assuming that she had not changed this intention, the provision in the will was manifestly the most advantageous of the two estates. While, however, there is no evidence that she actually knew that she was entitled to dower and had a right to elect, still the right to dower is so well known a right that the defendants can, I think, properly rely upon the maxim *ignorantia juris neminem excusat*; *Cooper v. Phibbs* (1867), L.R. 2 H.L. at p. 170; *Earl Beauchamp v. Winn* (1873), L.R. 6 H.L. 223; *Gillam v. Gillam* (1881), 29 Gr. 376. In the latter case the question now before me was very fully considered, and the widow was held to have made her election under

circumstances much less conclusive than those with which I have to deal.

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Street, J.

In my opinion the safe and proper course under the circumstances is to impute to the widow knowledge, which is undoubtedly common knowledge, that a widow is entitled to claim dower in the land of her deceased husband, and to hold that she must be taken to have made her election.

The action must, therefore, be dismissed with costs.

A. H. F. L.

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[DIVISIONAL COURT.]

CLAYTON V. PATTERSON.

*Principal and Agent—Hotel Manager—Moneys Received by—Liability to Account—Power of Court to Disregard Findings of Jury—Rule 615.*

The plaintiff was the manager of the defendant's hotel, and each evening went over the receipts and disbursements and entered a summary thereof in the cash book, taking over the money which constituted the balance on hand, which he subsequently deposited with the defendant's bankers. During the day the money was kept in a safe in the office, to which others had access. When any money was taken out a slip was put in shewing the amount so taken and the purpose. The plaintiff, while admitting the accuracy of the balance up to a specified date, claimed that he was not responsible thereafter, by reason of his not being then able, through overwork, to actually count the money taken over by him :—

*Held*, affirming a judgment of a County Court Judge setting aside a verdict of a jury in favour of the plaintiff and ordering judgment to be entered for defendant, that, under the circumstances, and in the absence of a positive statement shewing the inaccuracy of the balance which the cash book shewed to be on hand, the plaintiff was bound to account therefor.

The power conferred on the Court by Rule 615 to give judgment on the evidence before it, may be exercised, though the result may be to disregard the finding of a jury, but it must be used with great caution.

THIS was an appeal by the plaintiff from the order of the Senior Judge of the county court of the County of York, setting aside the verdict found by the jury and the judgment directed to be entered thereon, for the appellant,

Statement.

**Statement.**

and directing judgment to be entered for the respondents for \$64.07 with costs.

The facts sufficiently appear from the judgment.

On November 15th, 1900, before a Divisional Court composed of MEREDITH, C.J., and ROSE, J., the appeal was argued.

*Heyd*, Q.C., for the appellant.

*Malone*, Q.C., for the respondents.

November 29th, 1900. MEREDITH, C.J.:—

The appellant's claim is for the wages of himself and wife, and it was practically undisputed, the question between the parties being as to the liability of the appellant for moneys alleged to have come to his hands while acting as manager of the respondents' hotel at Penetanguishene, in respect of which there was a counterclaim by the respondent for \$273.47.

The learned judge in directing judgment to be entered for the respondents acted under the powers conferred by Consolidated Rule 615.

The decided cases establish that the power conferred by this Rule may be exercised though the result be to disregard the findings of the jury; but that it should be used with great caution: *Stewart v. Rounds* (1882), 7 A.R. 515; *McConnell v. Wilkins* (1885), 13 A.R. 438.

The facts, which were not seriously in dispute, or though disputed as to which there could reasonably be but one conclusion come to on the evidence, were these:—

The appellant acted as manager of the hotel. During part of his employment there were also employed in the office a clerk and a stenographer, and one of the respondents (Paisley) was on two or three days in each week at the hotel and took part in the management and supervision of it. It was the practice at the close of each day for the appellant to enter in a book, called the cash book, a summary of the receipts and disbursements of the day—

the receipts being classified according to the department of the business from which they were derived, and for him to take over the money in hand, which should have been equal to the balance on hand as shewn by the entries for the day in the cash book. These moneys the appellant kept in his own possession during the night, and from them made deposits with the bankers of the respondents as occasion required.

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Meredith, C.J.

Moneys were kept during the day in the office safe, to which the clerk and stenographer and the respondents, when they were at the hotel, had access, and when either of them took money from the safe for the purpose of the business it was his duty, and the practice was, to put in place of the money taken a slip shewing what had been taken and the purpose to which it had been applied.

No difficulty occurs as to the transactions prior to the 15th August, as the appellant admits his liability to account for the money which, according to the cash book, had been received down to that date; but for the moneys since that date he repudiates all liability to account.

The reasons which he gives for taking that position are (1) that, as he says, he was so over-worked that he could not verify the cash in hand with the daily balance shewn by the cash book; that after the 15th August he did not count the cash in hand at the close of the day, though he admits that in all respects except that the procedure was the same as before, *i.e.*, the entries were made and a sum supposed to represent the cash in hand was taken possession of by him; (2) that the other persons I have mentioned having had access to the cash, the difference between the balance on hand according to the books and the sum which the appellant paid out may have been paid out by them by mistake or otherwise or not entered in the books or replaced by a slip; (3) that when the auditor of the respondents made his audit, the books shewed a balance of \$431 of cash to be accounted for, which was subsequently reduced to \$273.47 owing to the

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Meredith, C.J.

discovery of vouchers for payments to the amount of the difference between these sums, which were on file in the office of the hotel, entries of which had not been made in the books; (4) that he was directed by the respondent Patterson to keep the moneys in hand in the safe during the day time; (5) that he pledged his oath that the sum which he paid over to the respondents was all the money of the respondents which he had on hand and that none of their moneys was misappropriated or taken to his own use, except the sums entered in the books as received by him.

Taking the facts as I have stated them, was it the duty of the appellant to account for the balance which the cash book shewed to be in hand, and failing to do so, to pay over in cash that balance?

Such was, it seems to me, his duty. The entries in the cash book were being made as the appellant knew in order to shew the balance of cash on hand after the day's operations were over, and in the absence of a positive statement by him that the cash taken into his immediate possession at the close of the day was not equal to the balance which the cash book shewed to be in hand—and there was no such statement, and not even a suggestion by the appellant of his belief that such was the case, no other inference could be reasonably drawn than that at the close of each day the appellant received into his immediate possession a sum in cash equal to the balance which the cash book shewed to be on hand. It is true that the appellant says that after the 15th August the cash was not counted by him; but that is, I think, plainly not enough to relieve him from the obligation which he is seeking to be rid of. Had there been one person in charge of each department, and had each of these persons at the close of the day brought to the appellant a statement of the day's transactions and handed to him a sum which was said to represent and should have properly represented the balance in hand according to that statement, in my opinion a finding that the appellant had not received the money supported

only by his statement that he had not counted the money would be one that a jury could not reasonably make, and I am unable to see any difference, as far as this point is concerned, between the case suggested and this case.

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Meredith, C.J.

If I am right thus far, it is of no consequence that others had access to the cash during the day, for at night the result, if any, of this was or might have been ascertained.

Nor is the fact of the unentered payments material. Granting that this establishes that the cash balance shewn on the days on which the payments were made was not the correct balance, it is not inconsistent with the fact that the payment had been made having been present to the mind of the appellant when the entries were made in the cash book, and having been taken into account, and perhaps the "tired" condition of the appellant, of which he made so much in his examination, may account for the vouchers not having been looked up then and the proper entries made in the book.

If it be as I have concluded that the appellant is bound to account for the balance as shewn by his entries in the cash book, the statement by him that he has accounted for everything that he received and has retained no money of his employers is no answer. The employers have a right to call upon him for an account, and such an explanation as the appellant makes falls very short of being an accounting, and could not, in my opinion, be found by a jury to be an accounting such as on the hypothesis upon which I am dealing with this branch of the case could discharge the appellant.

In my opinion the judgment appealed from is right and should be affirmed, and the appeal from it dismissed with costs.

ROSE, J., concurred.

G. F. H.

## [DIVISIONAL COURT.]

## SNETZINGER V. LEITCH ET AL.

*Landlord and Tenant—Covenant—Use of Hay on the Premises—Execution—Rights of Execution Creditor.*

Plaintiff leased a farm as a dairy farm and a number of cows, the lease containing the following clause: "All the hay, straw and corn stalks raised on the . . . farm to be fed to the said cows on the said . . . farm":—

*Held*, that while the property in hay produced on the farm might be legally in the tenant, yet his contract was so to use it that it should be fed to the cattle and consumed on the premises, and that he could not have the beneficial use of it or take it off the farm, and an execution creditor of his had no higher right than he had.

Judgment of the County Court of Stormont, Dundas and Glengarry reversed.

## Statement.

THIS was an appeal from the County Court of the united counties of Stormont, Dundas and Glengarry.

The action was brought by a landlord to restrain the removal of some of the produce of a farm (hay) by a purchaser at a bailiff's sale under an execution in a Division Court against the tenant, and was tried at Cornwall, on April 6th, 1900, before His Honour Judge O'REILLY, without a jury.

It appeared that the plaintiff had leased his farm as a dairy farm and thirteen milch cows to one Gallinger by a lease in writing in which was contained the following clause: "All the hay, straw and corn stalks raised on the Sand Bridge farm to be fed to the said cows on the said Sand Bridge farm," and the rent to be paid was two hundred pounds of cheese *for the yearly rent of each cow*.

A judgment creditor of the tenant seized and sold the hay produced on the farm under an execution issued out of a Division Court.

The trial Judge held that the hay was the property of the tenant and dismissed the action.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on October 8, 1900, before BOYD, C., FERGUSON and ROBERTSON, JJ.

*Robert Smith*, for the appeal contended that nothing passed to the tenant but what the lease conveyed, and as the hay was specially reserved, no property in the hay passed to the tenant and that no execution creditor could sell more than the tenant had; and that even the tenant could not dispose of it in any other way than by feeding it to the cattle, and referred to 8 Am. & Eng. Ency., 2nd ed., p. 323.

*Leitch*, Q.C., for the defendant Leitch the purchaser, contended that the proceeds of the land followed the demise to the tenant: that as there was no reservation of the hay nothing prevented a vesting in the tenant: that the landlord could not replevy the hay if the tenant sold it, and that the clause in the lease was merely a covenant on the part of the tenant as to how he would use the hay and referred to *Lybbe v. Hart* (1885), 29 Ch. D. 8, and *Hawkins v. Walrond* (1876), 1 C. P. D. 280.

*Gogo*, for the other defendants contended that the plaintiff was aware the hay was to be seized and sold and stood quietly by without objection and was estopped, and referred to *Geddes v. Morley* (1846), 1 O.S. 675: Kerr on Injunctions, 3rd ed. 14.

*Smith*, in reply.

December 18, 1900. BOYD, C.:—

The plaintiff leased a farm and thirteen cows to Gallinger for dairying purposes only, and the lease had these provisions:—"The said cows are to be kept on said farm and well and properly cared for and fed by the lessee during the term. . . All hay, straw, and corn stalks raised on the farm to be fed to the said cows on the said farm." The rent of the farm was to be paid by two hundred pounds of cheese for every cow.

This hay on the farm, after being cut and when needed for the cattle, was seized by an execution creditor of the tenant, and the right of the creditor thus to dispose of the hay is the thing in dispute.



## Judgment.

Boyd, C.

The case for plaintiff is that as the tenant could not himself dispose of the hay otherwise than by feeding it to the cattle on the place, he had no such interest as was seizable and saleable under execution.

For the defendant: that there is no reservation of the hay and crops to the landlord, that they vest in the tenant as part of the thing demised during the tenancy and are available for his creditors.

This language from the lease I have quoted may be regarded as a bargain or covenant to feed the hay to the cattle on the land.

I find the law in a strange state of unsettlement upon this subject.

In *Roden v. Eytton* (1848), 6 C.B. 427, the tenant was bound to consume all the *straw* grown on the farm upon the premises. A rick of corn was seized and sold under distress under terms that the *straw* was to be left on the farm. That is, the wheat was sold severed from the straw, which was not sold; it being, as said by Wilde, C.J., a disputed question whether the *straw* could be sold or not. And in giving judgment the Chief Justice said: "There being a question whether the straw could be legally sold—inasmuch as the tenant was under covenant with his landlord to consume all the hay and straw upon the farm—the tithe-owner seized the whole rick (which, being an entire thing, I think he was justified in doing), and sold the wheat only, leaving the straw upon the land, to be enjoyed by whoever might be legally entitled to it:" at p. 431.

This disputed question apparently grew out of the conflicting decisions referred to in *Abbey v. Petch* (1841), 8 M. & W. 419, and *Fruisher v. Lee* (1842), 10 M. & W. 709.

It was decided in *Abbey v. Petch* that where the tenant was under engagement not to carry off the hay and straw, the landlord, under distress, may sell it subject to a condition that the purchaser shall consume it on the premises.

In *Frusher v. Lee*, the Court referred to an earlier decision, unreported, adverse to the conclusion in *Abbey v. Petch*, and held that it was still an open question whether the produce could be sold subject to such a condition, which would leave it open for the landlord to authorize persons to bring cattle on the premises to depasture the hay and straw during the tenant's occupation.

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Boyd, C.

The matter next arose in *Ridgway v. Lord Stafford* (1851), 6 Exch. 404, where the Court in effect overruled *Abbey v. Petch*, and decided that the sale under distress must be irrespective of any covenant to expend the crop upon the farm. The correctness of *Ridgway v. Lord Stafford* was affirmed by the Common Pleas Division in 1876: *Hawkins v. Walrond* (1876), 1 C.P.D. 280, and the reason given was that 2 W. & M., sess. 1, ch. 5, sec. 2, regulating distress, required that the goods must be sold for the best price, and that the sale could not be clogged by such a condition.

Turning now to *Abbey v. Petch*, the line of observations made by Lord Abinger, C.B., appears to be most pertinent to the present situation. He said the tenant, by the terms of his covenant not to carry off the hay and straw, had no beneficial interest in them, and his opinion was that under distress no more should be sold than the tenant himself could dispose of. The same view is taken by Alderson, B., who says it is clear that the tenant could not have disposed of the goods on any other terms than those on which the landlord sold them: p. 421. That is, the tenant could not lawfully sell the goods from off the premises; so to do would be, as expressed by Coleridge, C.J., in *Hawkins v. Walrond*, "in fraud of a condition to the contrary in his lease": p. 283.

Again, as opposed to this, we have the language attributed to Pollock, C.B., in *Ridgway v. Lord Stafford*: "A covenant to expend the produce upon the land is a covenant that cannot run with a chattel; and it is quite plain that the tenant himself would have the power to sell without

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Boyd, C.

such a condition but would only be liable to his landlord for breach of covenant. . . . He clearly might send the goods to market and sell them": pp. 406-407. And Martin, B., observed: "There is no authority for saying that a covenant runs with a chattel": p. 405.

This view is adopted and elaborated by Baggallay, L.J., in *Lybbe v. Hart*, 29 Ch.D. 8, as to a covenant not to remove hay or straw. He says: "I think it is a covenant which does not run with the land, so as to be in any way attached to the land, nor does it run with the crops, if I may be allowed that expression": at p. 19. And Chitty, J., in the same case quotes approvingly the above passage cited from *Ridgway v. Lord Stafford* at p. 12.

But yet, again, in *Clegg v. Hands* (1890), 44 Ch. D. at p. 512, Cotton, L.J., and Lopes, L.J., dissent from Lord Justice Baggallay's exposition, and affirm that the covenant to use all the hay, etc., on the land does touch or concern the land, and does most materially affect it. This, the later view, agreeing as it does with the earlier one of Abinger, C.J., seems to me the preferable one, and will work with better equitable results in the "interests of good husbandry" than the more narrow legal view of the common law as held by Pollock, C.B.

See also *Hooper v. Clark* (1867), L.R. 2 Q.B. 200.

The reason of the thing would be in favour of this stipulation affecting the property demised—the dairy farm. The use and consumption of all the hay, straw, and green fodder by the cattle will enure to the improvement and enrichment of the soil. The rent issues out of the land and the cattle in the form of the annual payment of cheese, and the agreement as to the hay, etc., is one affecting the land and its conduct and management. It works as a charge upon the use of the leased premises, and affects the value as to both lessor and lessee.

For this and other reasons the courts of equity will interfere to enforce a covenant to consume hay on the land at the instance of the landlord, as such an agreement

savours of the realty. In *Phipps v. Jackson* (1887), 56 L.J. Ch. at p. 551, Stirling, J., said: If a covenant to consume the whole of the hay exists, and the tenant is about to remove it, an injunction will be granted. And in *Crosse v. Duckers* (1873), 27 L.T. 816, Wood, V.-C., intimates that in such a case the landlord's equitable right to the hay ought not to be defeated by the device of removing it from the land, and so granted an injunction.

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Boyd, C.

In regard to a sale under execution, different considerations arise from those pertinent to the right of distress. In the former case, the rule settled in equity is that the measure of what may be sold is the extent of the debtor's interest in the property seized. It is said by Malins, V.-C., that in the court of equity a judgment creditor could take of his debtor only such property as was the debtor's own—he can take only what his debtor can give, *i.e.*, only what property belongs to the debtor: *In re The Blakely Ordinance Co.* (1876), 25 W.R. 111, and also in 46 L.J. Ch. at p. 372. As expressed by James, V.-C., the judgment creditor does not get the thing itself but only the interest of the judgment debtor in the thing: *De Wolf v. Pitcairn* (1869), 17 W.R. 914. I find the whole matter fully discussed and considered in *Beeston v. Marriott* (1863), 4 Giff. 436. Rents and chattels were by contract the absolute property of the company when placed on the construction-site, but subject to contractor's right to use them on the work, etc. Stuart, V.-C., held that the absolute right of property in the company was qualified by these stipulations: that, as being chattels dedicated to a particular purpose in which both company and contractor were interested as to that use, they were not liable to be taken in execution by any creditor of the company, and he enjoined the sheriff against selling under process.

These considerations apply with much accuracy to the goods now in question. While the property may be legally in the tenant, yet his contract is so to use the stuff that it shall be fed to the cattle and consumed on the

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Boyd, C.

premises. As put in the case, 8 M. & W. 419, he is not to have the beneficial use of the produce, and cannot by his contract take it off from the farm. And, therefore, his judgment or execution creditor should not have such power under cover of an execution: see *Morton v. Cowan* (1894), 25 O.R. at p. 531.

The conflicting authorities which I have considered seem to indicate that this is another example of variance between the doctrines of law and of equity as to the effect and enforcement of executions. According to the direction of the Judicature Act in such conflict, the doctrines of equity are to prevail: R.S.O. 1897, ch. 51, sec. 58 (13).

The result now reached was measurably attained at law by virtue of a statute in England passed in 1816, 56 Geo. III., ch. 30, by which, upon notice to the sheriff of any covenant not to remove hay, etc., he shall not sell it contrary to the covenant, but may dispose of it subject to an agreement to expend it on the land. That enactment, I take it, is not in force in Ontario, though the point was left open in *Robertson v. Fortune* (1860), 9 C.P. at p. 431. Probably, on account of this statute, the precise question now in hand has not arisen in England of late years: *Sir Robert Edward Wilmot v. Rose* (1854), 3 E. & B. 563.

The plaintiff seeks an injunction to restrain the purchaser and his bailiff from entering the land and removing the hay sold under execution. This is appropriate relief. There was some hay removed, and for this \$25 damages may be awarded against the defendant, and also costs of action in the County Court.

This appeal was not argued on the grounds as now decided, and considering the state of the authorities and conflict of opinions, it is not a case to give costs of appeal—though the appeal is allowed.

FERGUSON, J.:—

Appeal from the County Court of Stormont, Dundas and Glengarry.

The plaintiff being the owner of a certain farm in the township of Cornwall known as the Sand Bridge farm, by an indenture dated the 9th day of April, 1898, let the same, together with certain stock of the plaintiff consisting of thirteen milch cows, to one H. L. Gallinger. The rent to be paid was, as stated in the lease, two hundred pounds of cheese for the yearly rent of each cow. The term mentioned in the indenture is one year from the 15th day of April, 1898. At the expiration of this period the tenant simply continued in possession and worked the farm as before, and he is still in possession in the same way.

The plaintiff in his evidence says that the terms of the holding have been the same from the beginning—those expressed in the indenture. There does not appear to be any difference between the parties in this respect.

One of the terms and conditions expressed in the indenture is in the words following: "The said lessee agrees to work the said Sand Bridge farm in a good manner, and to take good care of the said cows during the term of this lease. All the hay, straw and corn fodder raised on the said Sand Bridge farm to be fed to the said cows on the said Sand Bridge farm." No difficulty arises by reason of there being or having been any surplus of hay, straw or corn fodder over and above what was necessary for the purpose of properly feeding the cows. There was no such surplus.

So far as appears there was no attempt on the part of the tenant to violate any of these terms of the lease. But a creditor of the tenant, one Herman Eanson, obtained a judgment of the Third Division Court of the said county against him (the tenant) for the sum of \$61.35. On this judgment execution was duly issued and placed in the hands of the bailiff, the defendant Gravely, to be executed. There was some of the hay that had grown upon this farm which had not been fed to the cows, and the bailiff, under the authority, or at all events, supposed

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Ferguson, J.

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authority, of the execution, seized and sold a quantity of this hay as property of the execution debtor, the tenant, liable to be taken to satisfy the execution, the defendant Leitch becoming the purchaser at such sale.

The purchaser, with the aid and assistance of the bailiff and the other defendants made the attempt to remove the hay so purchased by him off this farm, and had removed part of it when the plaintiff brought this action for the purpose of preventing the removal of the hay, so that it might be used and consumed on the farm in accordance with the provisions in this regard contained in the indenture of lease.

The action was tried before the learned Judge of the County Court and was dismissed with costs. From this judgment is the appeal.

At the argument there was some contention as to whether or not this provision in the lease regarding the hay, straw, etc., amounted to a covenant on the part of the tenant. It seems to me to be certainly a promise above the signature and seal of the tenant made for the benefit of his landlord, and is, as I think, a covenant, though it is immaterial whether it is called by that name or not. Then, as said by Lindley, L.J., in the case *Hawkins v. Walrond*, 1 C.P.D. at p. 285, "The covenant is a covenant by the tenant for the landlord's benefit, which the landlord could enforce by action or injunction against the tenant or purchaser with notice."

It seems to me to be clear, that if the tenant had in the face of the provisions contained in the lease, attempted to remove the hay, etc., from the farm so that it could not be fed to the cows and consumed on the farm, the plaintiff could have obtained an order of the Court enjoining the tenant against his so doing.

A contention was, that as the tenant had an estate in the land and while in possession and occupation according to such estate raised and cured this hay, he was the owner of the hay, and that it was legally liable to be seized and

sold under an execution against his goods obtained in an action by his creditor, even though the tenant could be restrained from moving the hay off the farm and was bound by the contract to feed it to the landlord's cows on the farm: this last, as I understand the matter, being intended to be for the benefit of both the landlord and the tenant, and it was said that the right to restrain the tenant from removing the hay from the farm rested or would rest wholly upon his personal covenant and to prevent a breach of it by him to the injury of his covenant the landlord. • It seems to be true—and the plaintiff in his evidence says so—that the only right he, the landlord, had in respect of this hay arose and existed by virtue of this provision in the lease.

The question is, as I think, fairly raised, as to whether or not a purchaser at a sale under an execution issued by a creditor acquires, or can, by his purchase acquire, a higher and better and fuller right to the chattels sold than the debtor against whom the execution is had or possessed at, or immediately before, the time of the sale.

In the case, *Beeston v. Marriott* (1863), 4 Giff. 436, the contract between the plaintiff and the railway company provided, in express terms, that the property which was afterwards seized under an execution against the company should, when placed upon the land of the company, become the absolute property of the company, and that the contractor who placed it there (the plaintiff) should have no property therein, the contract, however, providing for the right of using the property on the land for the purpose of the works, and that on completion of the line under contract as a condition precedent the part of the property called "plant" was to be given to the contractor (the plaintiff) as part consideration for the performance, or if used by the company, to be paid for, and it was held that this property was not liable to be seized and sold upon an execution issued by a creditor of the company; it was held and decided that the rights must

Judgment.

Ferguson, J.



Judgment.

Ferguson, J.

be governed by the stipulations in the contract and that the company had not the absolute right to the property, and that it could not properly be taken and sold upon an execution against the company issued at the instance of a creditor of the company.

That was a case relating to a very different subject matter. Yet here, as there, there is a contract defining the rights of the parties to it by virtue of which, the landlord (the plaintiff) is entitled to benefits from the hay in question.

The case *In re Blakely Ordnance Co.* (1876), 25 W.R. 111, had relation to stock in the hands of a trustee. Vice-Chancellor Malins, in delivering the judgment, said it was a settled rule of the Court that a judgment creditor could have of the debtor only such property as was the debtor's own, and referred to a decision of Vice-Chancellor Wigram, affirmed by Lord Cottenham, which clearly settled this: "That a judgment creditor could take only what his debtor could give him"; and in the case *De Wolf v. Pitcairn* (1869), 17 W.R. 914, it was held that even where the judgment was against specific property the creditor could not get the property itself but only the debtor's interest in it. In *Morton v. Cowan* (1894), 25 O.R. 529, it is laid down that the rule as to sales by act of the law is that the measure of what is sold is the extent of the debtor's interest in the property sold, and not the exact specific property itself, whether it be real or personal property.

I may here say that I have perused a very large number of cases having some bearing on the subject, so many that it would be cumbersome to refer to them all here, and that contrary to my first view I have arrived at the conclusion that all that Leitch, the purchaser, took by his purchase under the execution, was the right that the debtor (the tenant) had and could give him, which right was settled and defined by the contract between the tenant and his landlord, and did not and could not include the right to remove the hay, so that it could not be fed to the

cows and consumed on the farm, the subject of the lease.

Judgment.

The plaintiff is in my opinion entitled to the injunction he asks. As to certain minor details and the disposition of costs I agree with the Chancellor.

Ferguson, J.

ROBERTSON, J. :—

After the argument, I came to the conclusion that the appeal must be allowed. I have since had the satisfaction of reading the judgments of the Chancellor and my brother Ferguson, and I am confirmed in my original opinion. I need not add anything further.

The appeal should be allowed, but without costs.

G. A. B.

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[DIVISIONAL COURT.]

REGINA V. SPOONER.

*Criminal Law—“Appear the Keeper of House of Ill-Fame”—Conviction—Certiorari—Pleading Guilty—Summary Conviction Clauses of the Code—Trial on the Merits.*

The offence of being a keeper of a house of ill-fame is an indictable offence, and it may be tried either before a jury in the ordinary way or before a Police Magistrate under the summary trials clauses or before a Justice of the Peace under the summary convictions clauses of the Code.

A prisoner was convicted by a Police Magistrate, after pleading guilty to the charge that she did “unlawfully appear the keeper of a house of ill-fame” and was sentenced to be imprisoned for one year in the Andrew Mercer reformatory :—

*Held*, that the conviction might be treated as having been made under the summary convictions clauses of the Code, although the sentence exceeded the power of the magistrate and that such conviction might be supported and the sentence amended under those clauses :—

*Held*, also, that where a prisoner charged before a magistrate with unlawfully appearing the keeper of a house of ill-fame had pleaded guilty to such charge there was a trial on the merits, and that such person was to be deemed guilty of the offence of keeping a house of ill-fame.

THIS was an application to quash a conviction. Upon the proceedings being brought into court under the cer-

Statement.

**Statement.**   tiorari it appeared that the prisoner was in close custody. The court, following *Regina v. Randolph*, ante p. 212, there being sufficient material before it, directed a *habeas corpus* to issue in order that the application might be effectually dealt with in one proceeding.

The following statement of facts is taken from the judgment of STREET, J.:—

An information was laid against the prisoner on 16th November, 1900, before the police magistrate for the city of St. Catharines, that she did on the 14th November, 1900, at the said city of St. Catharines, "unlawfully appear the keeper of a house of ill fame," in a house situated in Church street in the said city.

Upon being brought before the magistrate she pleaded not guilty, and asked for a postponement of the trial until a later hour upon the same day, which was granted.

She then appeared with her counsel, *Mr. J. C. Rykert*, and, upon his advice, she withdrew her former plea and pleaded "guilty," and was thereupon convicted and sentenced to be imprisoned for one year in the Andrew Mercer (Ontario) reformatory for females.

The proceedings were then brought into the High Court by certiorari issued on behalf of the prisoner, and a rule nisi to quash the conviction was granted.

Upon the return of the rule nisi, the prisoner was brought up on habeas corpus and the rule was argued before the Divisional Court (FALCONBRIDGE, C.J., and STREET, J.) on the 11th and 22nd December, 1900.

*Robinette*, and *J. M. Godfrey*, for the prisoner. The defendant was not given an opportunity of electing to be tried by a jury. The magistrate proceeded under secs. 783 and 784 of the Code, and so could not impose a longer sentence than six months. The sentence is illegal and cannot be amended under sec. 889 of the Code, which does not apply to summary trials of indictable offences, but merely to summary convictions. The conviction does

not disclose any offence. "Appearing to be the keeper of a house of ill fame" is not an offence. We refer to *Regina v. Gibson* (1898), 29 O.R. 660; *Regina v. Murdock* (1900), 27 O.R. 443; *The Queen v. Egan* (1843), 1 Can. Crim. Cas. 29; *Regina v. Justices of London* (1892), 17 Cox C. C. 526; *Regina v. Randolph* (1900), 32 O.R. 212.

Argument.

*John Cartwright*, Q.C., Deputy Attorney-General, contra. By sec. 34 of R.S.C. ch. 183, the magistrate has power to commit to the Mercer for a period of two years. That Act was not repealed by the Code. In any event the magistrate may be considered as having proceeded under secs. 207 and 208 of the Code, and the court has power to amend under sec. 889. No objection was taken at the trial, before the prisoner pleaded, as is required by sec. 629, "appearing to be" and "being" the keeper of a house of ill fame are one and the same thing.

*Robinette*, in reply. The term of two years provided for under sec. 34 of R.S.C. ch. 183, only applies to prosecutions under R.S.C. ch. 157, and no such prosecution can take place as that Act is repealed.

Dec. 27th, 1900. The judgment of the court was delivered by STREET, J.:—

The objections principally urged to the validity of the conviction were: 1st. That no offence was charged in the information to which the prisoner pleaded "guilty," and 2nd, That the police magistrate had imposed a punishment in excess of that authorized by the Criminal Code.

The conviction as originally drawn up followed the information, and convicted the prisoner that she did "unlawfully appear the keeper of a house of ill fame," but the conviction returned by the police magistrate upon certiorari is that she "did unlawfully keep a house of ill fame," and that she pleaded guilty to such charge.

The 198th section of the Code provides that everyone is guilty of an indictable offence and liable to one year's

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Street, J.

imprisonment who keeps any disorderly house, that is to say any common bawdy house . . . as herein defined, and in the subsection to that section it is provided that "any one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house shall be deemed to be the keeper thereof, and shall be liable to be prosecuted and punished as such, although in fact he or she is not the real owner or keeper thereof."

By the 195th section, "a common bawdy house is a house, room, set of rooms or place kept for purposes of prostitution."

By the 207th section, "every one is a loose, idle or disorderly person or vagrant who (j) is a keeper or inmate of a disorderly house, bawdy house, or house of ill fame, or house for the resort of prostitutes"; and by section 208, as amended by 57-58 Vict., ch. 57: "every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding \$50, or to imprisonment with or without hard labour for any term not exceeding six months, or to both."

By section 783, "whenever any person is charged before a magistrate (f) with keeping or being an inmate . . . of any . . . house of ill fame, or bawdy house, . . . the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way."

By section 784, the jurisdiction of the magistrate to try a person charged with this offence, in a summary way, is absolute, and does not depend upon the consent of the accused.

By section 788: In any such case the magistrate after hearing the whole of the evidence may convict the person charged, and commit him to the common gaol or other place of confinement for any term not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, \$100, or to both fine and imprisonment not exceeding the said sum and term, etc.

Under the sections to which I have referred it appears that the offence of being the keeper of a house of ill fame is an indictable offence, and that it may be tried either before a jury in the ordinary way, or before a police magistrate under the summary trials clauses, or before a police magistrate or justice of the peace under the summary convictions clauses of the Criminal Code.

The punishment upon conviction under the summary convictions clauses, by way of imprisonment when costs are not imposed, is limited to six months.

When the prisoner is tried by a jury in the ordinary way he may be sentenced under sec. 198 of the Code to a year's imprisonment, or apparently under sec. 34 of ch. 183 of the Revised Statutes of Canada, which is one of the statutes not repealed by the Code, to two years' imprisonment in the Andrew Mercer reformatory.

It was argued before us on behalf of the prisoner that this sec. 34 could not be treated as being in force, because the two Acts referred to in it are repealed and re-enacted by the Code; but it is plain from sub-sec. 51 of sec. 7 of ch. 1 of the Revised Statutes of Canada (the Interpretation Act) that the reference to the statutes in question by their original names is as effectual as if the reference had been to the sections of the Code substituted for them.

There is nothing upon the face of the conviction before us requiring us to hold either that the police magistrate, who is, of course, a justice of the peace (see sub-sec. (a) of sec. 839), was trying the prisoner under the summary trials clauses, or under the summary convictions clauses. In all essential parts the conviction stands as well under one as under the other procedure, and it is only because the sentence is one which could not be imposed by a justice under the summary convictions clauses that we obtain any clue guiding us to the clauses under which the magistrate supposed himself to be acting.

Are we bound to follow this clue, and none other? Or may we support the conviction, amending the sentence,

Judgment.

Street, J.

Judgment.  
Street, J.

under the summary convictions clause if it appears that the ends of justice will be better served by so doing than by treating the conviction as necessarily made under the summary trials clauses? The question is, I think, important in view of the fact that the powers of amending convictions are much greater under the former than under the latter procedure.

In my opinion to order the absolute discharge from custody of a prisoner who, after due deliberation, has plainly intended to plead guilty to the offence of being the keeper of a house of ill fame, solely because she has been sentenced to a year's instead of to six months' imprisonment, where we have power to correct the sentence, would lead to a manifest failure of justice, and would be contrary to the spirit of the powers of amendment given by the Code.

I therefore proceed to treat the conviction as having been made under the summary convictions clauses of the Code.

Under sec. 889 of the Criminal Code it is provided that no conviction shall, on being brought up by certiorari, be held invalid for any irregularity, informality or insufficiency therein, provided the court before whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction has been committed over which the justice convicting has jurisdiction; and that the court when so satisfied as aforesaid shall, even if the punishment imposed is in excess of that which might lawfully have been imposed, may modify the sentence and exercise any power which the justice convicting might have exercised.

And by sec. 896 of the Code, whenever it appears by the conviction that the defendant has appeared and pleaded and the merits have been tried, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall

be such a fair and liberal construction as will be agreeable to the justice of the case.

Judgment.

Street, J.

Upon being brought before the magistrate and charged with appearing the keeper of a house of ill fame, the prisoner pleaded guilty. This was a trial upon the merits, and the plea was an admission by the prisoner that she appeared to be the keeper of such a house. By sub-sec. 2 of sec. 198 of the Code, a person who appears to be the keeper of such a house is "deemed" to be the keeper thereof, so that the prisoner having admitted that she appeared to be the keeper of the house is to be deemed for the purposes of the prosecution to be guilty of the offence, and the amended conviction which has been returned to us with the certiorari did not substantially vary from the conviction as originally drawn up, and the original conviction and commitment should be amended accordingly.

To avoid any possibility of the appearance of straining the law against the prisoner by upholding the conviction and giving to her every benefit of her objections to which she is entitled, I think we should amend the conviction and modify the sentence by reducing it from one year to six months, and the order to be taken out upon this motion will set forth that we have exercised the powers conferred on us by sec. 889 of the Code by so doing. In other respects the rule nisi should be discharged.

G. A. B.

END OF VOL. XXXII.





**A DIGEST**  
 OF ALL THE  
**CASES REPORTED IN THIS VOLUME,**  
 BEING DECISIONS IN THE  
**HIGH COURT OF JUSTICE FOR ONTARIO.**

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**ACCIDENT INSURANCE.**

*See* INSURANCE, 4, 5.

**ACCOUNT.**

*See* PRINCIPAL AND AGENT—  
TENANT FOR LIFE.

**ACQUIESCENCE OF CROWN.**

*See* CONSTITUTIONAL LAW.

**ACTION.**

*See* COMPANY, 4—EXECUTORS  
AND ADMINISTRATORS.

**ADMINISTRATION.**

*Summary Order—Discretion  
to Refuse—Rules 946, 954—  
Fund—Savings Deposit—Sur-  
vivorship—Husband and Wife.*  
—There is now a discretion  
under Rules 946 and 954, in  
dealing with applications for  
administration orders, and the  
Judge or officer is not obliged  
to grant a summary order unless

it appears that some good result  
will follow.

Order refused where the  
widow of an intestate was  
clearly entitled to a fund which  
was the only matter in dispute.

Where a husband deposited  
money with a savings company  
and caused an account to be  
opened in the name of himself  
and his wife jointly, "to be  
drawn by either or in the event  
of the death of either to be  
drawn by the survivor," and it  
appeared by her evidence, un-  
contradicted, that money of hers  
went into the account and that  
both drew from it indiscrimi-  
nately:—

*Held*, that she was entitled  
as survivor to the whole fund.  
*Re Ryan*, 224.

*See* DEVOLUTION OF ESTATES  
ACT.

**ADMINISTRATOR.**

*See* EXECUTORS AND ADMINIS-  
TRATORS.

**AMENDMENT.**

See CRIMINAL LAW, 1—DIVISION COURTS, 1.

**APPEAL.**

See JUDGMENT, 2—SOLICITOR, 2.

**ASSESSMENT AND TAXES.**

1. *Special Rate—Bonus By-law—Duty of Clerk—Collector's Roll—Debentures, Sale of—Failure of Scheme.*—Where a by-law of a township corporation provided for the raising by the issue and sale of debentures of a certain sum to be paid by way of bonus to a railway company, and for the levying of an annual rate for the purpose of paying the debentures:—

*Held*, that it was the duty of the township clerk under sec. 129 of the Assessment Act, without any further direction or authorization, to insert in the collectors' rolls the amount with which each ratepayer was chargeable under such by-law; and it was not necessary that the amount levied each year under such by-law should be mentioned in the annual by-law authorizing the levy of sums for ordinary expenditure; and sec. 402 of the Municipal Act had not the effect of making it necessary.

*Clarke v. Town of Palmerston* (1883), 6 O.R. 616, distinguished.

2. That the rate could be levied notwithstanding that none

of the debentures had been sold.

3. That the failure to collect the rate for the first year after the passing of the by-law did not cause the failure of the whole scheme.

*Semble*, that if the scheme should fail and nothing be paid to the railway company, the ratepayers could recover their money from the corporation. *Bogart v. Township of King*, 135.

[Reversed by the Court of Appeal, 2nd March, 1901.]

2. *Invalid Tax Sale—Insufficient Description—Assessment En Bloc Instead of According to Registered Plan.*—An assessment of lots as 'Water Lots 436 x 660' is invalid as not identifying them.

An assessment of lots en bloc after they have been subdivided by registered plan, and without shewing the known owner against whom particular parcels are assessable, is invalid as disregarding the essential requirements of R.S.O. 1897 ch. 224, sec. 13.

The requirements of R.S.O. ch. 224, secs. 147, 152-5, inclusive, as to the duties of the collector, treasurer, clerk, and assessor, with reference to the list of lands liable to be sold, were held not to have been complied with in this case; and the defects were held not to have been cured by sec. 208, which makes the tax deed binding if the land is not redeemed in one

year, nor by sec. 209, by which the deed is valid if not questioned within two years. *Wildman v. Tait*, 274.

3. *Failure to Distrain—List of Lands—Non-delivery by Clerk to Assessor—Omission to Notify Occupants—Non-delivery by Assessor to Treasurer of Certified List.*—Where after a sale of land for taxes it appeared that there had been a failure to distrain, although sufficient goods were on the premises to have paid the taxes during each of the years they became due, and also that the account furnished by the collector did not, as required by sec. 135 of R.S.O. 1887 ch. 193 (R.S.O. 1897 ch. 224, sec. 147), shew the reason why the taxes had not been collected; that there was no delivery to the collector by the clerk of the list furnished him by the treasurer, as required by sec. 141, R.S.O. 1887 ch. 193 (R.S.O. 1897 ch. 224, sec. 153), and no notification, as also required by that section, by the collector to the occupant or owner of the land, who lived in the vicinity, and whose name could easily have been ascertained, of its liability to be sold for taxes; and no certificate verified by oath, as required by sec. 142, R.S.O. 1887 ch. 193 (R.S.O. 1897 ch. 224, sec. 154); nor any list furnished by the clerk to the treasurer of the lands which had become occupied or were incorrectly des-

cribed, as required by sec. 143, R.S.O. 1887 ch. 193 (R.S.O. 1897 ch. 224, sec. 155):—

*Held*, that the sale was invalid; and the invalidity was not cured by secs. 189, 190, R.S.O. 1887 ch. 193 (R.S.O. 1897 ch. 224, secs. 208, 209), which validate a sale on the expiration of two years from the making of the tax deed. *Boland v. City of Toronto*, 358.

See MUNICIPAL CORPORATIONS, 4.

### ASSIGNMENTS AND PREFERENCES.

See BANKRUPTCY AND INSOLVENCY—COMPANY, 2, 3.

### BANK DEPOSIT.

See ADMINISTRATION—GIFT—SET-OFF.

### BANKRUPTCY AND INSOLVENCY.

1. *Assignment for Creditors—Examination of Assignor—Unsatisfactory Answers—Concealment—Committal.*—The provisions of sec. 36 of R.S.O. 1897 ch. 147, which provide for the punishment of an assignor who has concealed or made away with his property in order to defeat or defraud his creditors, do not apply to his acts disclosed on examination as having been done before the date of the passing of the original Act, 58 Vict. ch. 23 (O.)

Judgment of FALCONBRIDGE, J., reversed. *Re Lucas, Tanner, & Co.*, 1.

2. *Preference—Promise to Give Security—Presumption—Rebuttal—Payment—Transfer of Security—Cheque—Promissory Notes—Discount by Third Person.*]—In April, 1898, a firm of traders, desiring to purchase goods, obtained from a bank accommodation to the extent of about \$8,200 for the purpose of buying them, upon promissory notes indorsed for their accommodation by the defendant, a brother of one of the partners; they promising him to retire the notes out of the proceeds of the sales of the goods. The proceeds were not so applied, to the defendant's knowledge, and the notes were from time to time renewed in full, the defendant indorsing them upon each renewal. He was satisfied by a general promise that they would secure him, but no security was ever definitely mentioned, nor did he ever press for it. On the 27th May, 1899, the firm sold out their assets for nearly \$11,000, their liabilities being about \$19,000. Before the sale was carried out the defendant became aware that the firm was insolvent. The purchase money was paid to the firm, \$1,000 in cash, \$5,000 by a cheque to their order, and the remainder by promissory notes. The firm handed over the cash to the defendant, and indorsed the

cheque and some of the notes to him, and he with the cash and the proceeds of the cheque and notes, the latter being at his request indorsed and discounted for him by a stranger, retired all the notes upon which he was liable, and paid, besides, some rent, taxes, and other debts due by the firm. On the 2nd June, 1899, the firm assigned to the plaintiff for the benefit of their creditors; and this action was afterwards brought to recover from the defendant the amount applied in retiring the notes, upon the ground that he had been unjustly preferred:—

*Held*, that the promise to give the defendant security could only mean that the firm, being unable to pay or secure the notes for fear of bringing on immediate insolvency, would pay or secure them in the future in case their affairs should become desperate, and such a promise was not sufficient to rebut the statutory presumption of a preference.

The payment of \$1,000 in cash to the defendant could not be attacked, and that should be treated as having formed part of the sum of \$5,200 paid to retire two of the notes.

The \$5,000 cheque transferred to the defendant was not a payment in cash, but was the transfer of a security, and he was liable to repay the proceeds of it, less the portion expended in paying debts, etc., of the firm.

The notes indorsed by the firm, and handed to the defendant for the purpose of procuring the payment of the remaining note which he had indorsed for them, were handed by him to the stranger in pursuance of that purpose, and what the latter did was done for the defendant, and not for the firm, and must be treated as if done by the defendant himself. *Armstrong v. Johnston*, 15.

3. *Assignments and Preferences—Secret Agreement—Onus—Voluntary Payments—Attack on—Assignee for Creditors—Privity.*—In an action by certain creditors of an insolvent and by his assignee for the general benefit of creditors to recover from the defendants, who were also creditors of the insolvent, certain sums of money paid by the insolvent to the defendants before the assignment, under the terms of an alleged secret agreement:—

*Held*, that the onus of proof was on the plaintiffs.

*Held*, also, that, the payments not being procured by unjust oppression or extortion on the part of the defendants, but being voluntary, the assignee could not recover.

Review of English cases on this point.

Nor could the other plaintiffs, not being the whole body of creditors, recover, even when using the name of the assignee as plaintiff by virtue of an order

under R.S.O. 1897 ch. 147; and no privity such as would give a right of action was established between the creditor plaintiffs and the defendants by an agreement for an extension of time for payment entered into by these plaintiffs and defendants and the insolvent, before the alleged secret agreement. *Langley v. Van Allen*, 216.

See COMPANY, 1, 2, 3—SET-OFF.

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### BAWDY HOUSE.

See CRIMINAL LAW, 2.

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### BENEFIT CERTIFICATE.

See INSURANCE, 1.

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### BILLS OF EXCHANGE AND PROMISSORY NOTES.

See BANKRUPTCY AND INSOLVENCY, 2—SET-OFF.

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### BILLS OF SALE AND CHATTEL MORTGAGES.

*Hire Receipts—Transfer of Rights under—Conditional Sale of Chattels.*—The purchaser of a piano under a hire receipt (by which the property was to pass to him only on completion of certain payments on account) before he had paid the required sum, agreed with his wife that she should purchase his interest and pay the balance due the

vendors. There was no bill of sale registered nor such change of possession as required by the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897 ch. 148:—

*Held*, that the transaction was invalid as against execution creditors under sec. 37 of that Act, and was not within sec. 41, sub-sec. 4, which is intended to except only conditional sales of chattels within R.S.O. ch. 149, which this was not.

*Held*, however, that the wife was entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her. *Eby v. McTavish*, 187.

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### BOND.

See RAILWAYS AND RAILWAY COMPANIES, 2.

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### BONUS.

See MUNICIPAL CORPORATIONS, 2—RAILWAYS AND RAILWAY COMPANIES, 2.

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### BRIDGES.

See RAILWAYS AND RAILWAY COMPANIES, 3.

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### BY-LAW.

See ASSESSMENT AND TAXES—COMPANY, 2—MUNICIPAL CORPORATIONS, 1, 2, 4—TRADE UNION.

### CALLS.

See COMPANY, 2.

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### CARRIERS.

*Railways—Consignment of Goods*—"Order"—*Production of Shipping Bills—Contributory Negligence.*]—The plaintiffs, knowing that the defendants sometimes delivered goods without production of the shipping bills where not consigned "to order," consigned certain goods to the "I. C. Company," not yet incorporated, and the defendants delivered them to an individual carrying on business in that name and at the ostensible office of the company, without production of the bill:—

*Held*, that the defendants were not liable for misdelivery.

There is no law in this Province requiring carriers to take up shipping bills before the delivery of goods. *Conley v. Canadian Pacific R. W. Co.*, 258.

[Affirmed by a Divisional Court, 5th March, 1901.]

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### CASES.

*Aldous v. Hicks*, 21 O.R. 95, approved, 175.]—See MORTGAGE, 1.

*Barber v. McCuaig*, 24 A.R. 492, 29 S.C.R. 126, followed, 175.]—See MORTGAGE, 1.

*Boice v. O'Loane*, 3 A.R. 167, followed, 422.]—See JUDGMENT, 2.

*Chamberlain's Wharf, Limited v. Smith*, [1900] 2 Ch. 605, considered.]—See TRADE UNION.

*Chatillion v. Canadian Mutual Fire Co.*, 27 C.P. 450, considered and commented on, 376.]—See INSURANCE, 3.

*Clark v. Town of Palmerston*, 6 O.R. 616, distinguished, 135.]—See ASSESSMENT AND TAXES, 1.

*Connecticut Mutual Life Ins. Co. of Hartford v. Moore*, 6 App. Cas. 644, distinguished, 163.]—See DEFAMATION, 2.

*Connor v. Middagh*, 16 A.R. 356, followed, 247.]—See MUNICIPAL CORPORATIONS, 4.

*Floor v. Michigan Central R.W. Co.*, 27 A.R. 122, 127, specially referred to, 163.]—See DEFAMATION, 2.

*Graham v. Ontario Mutual Ins. Co.*, 14 O.R. 318, considered and commented on, 376.]—See INSURANCE, 3.

*Graham v. Tomlinson, Re*, 12 P.R. 367, not followed, 418.]—See DIVISION COURTS, 2.

*Hill v. Middagh*, 16 A.R. 356, followed, 247.]—See MUNICIPAL CORPORATIONS, 4.

*Jay v. Johnston*, [1896] 1 Q.B. 25, 189, not followed, 422.]—See JUDGMENT, 2.

*Kelly v. Davidson*, 31 O.R. 521, affirmed, 8.]—See MASTER AND SERVANT, 1.

*Kinsey v. Roche*, 8 P.R. 515, approved, 418.]—See DIVISION COURTS, 2.

*Lawless v. Anglo-Egyptian Cotton and Oil Co.*, L.R. 4 Q.B. 262, followed, 295.]—See DEFAMATION, 3.

*Lawson v. McGeoch*, 22 O.R. 474, 20 A.R. 464, followed, 9.]—See COMPANY, 1.

*Leizert v. Township of Mattilda*, 26 A.R. 1, distinguished, 226.]—See MUNICIPAL CORPORATIONS, 3.

*Liverpool General Brokers' Association v. Commercial Press Telegram Bureaux*, [1897] 2 Q.B. 1, followed, 393.]—See COPYRIGHT, 2.

*McCulloch v. Township of Caledonia*, 25 A.R. 417, followed, 247.]—See MUNICIPAL CORPORATIONS, 4.

*McDermid v. McDermid*, 15 A.R. 287, followed, 418.]—See DIVISION COURTS, 2.

*Mathers v. Helliwell*, 10 Gr. 172, explained, 175.]—See MORTGAGE, 1.

*Merrill v. Travellers' Insurance Co.*, 91 Wis. 329, distinguished, 411.]—See INSURANCE, 5.

*Mineral Water Bottle, etc., Society*, 3 Ch.D. 465, considered, 305.]—See TRADE UNION.

*Perkins v. Dangerfield*, 51 L.T.N.S. 535, distinguished, 163.]—See DEFAMATION, 2.



*Regina v. Caton*, 16 O.R. 11, followed, 20.]—See MUNICIPAL CORPORATIONS, 1.

*Rigby v. Connol*, 14 Ch.D. 482, considered, 305.]—See TRADE UNION.

*Swaine v. Wilson*, 24 Q.B.D. 252, considered, 305.]—See TRADE UNION.

*Trimble v. Hill*, 5 App. Cas. 342, at p. 344, specially considered, 422.]—See JUDGMENT, 2.

*Trust and Loan Co. v. McKenzie*, 23 A.R. 167, dissented from, 175.]—See MORTGAGE, 1.

*Wagner v. Jefferson*, 37 U.C.R. 551, distinguished, 382.]—See HUSBAND AND WIFE.

*Wakefield Rattan Co. v. Hamilton Whip Co.*, 24 O.R. 107, not followed, 243.]—See COMPANY, 3.

*Webster v. Crickmore*, 25 A.R. 97, distinguished, 9.]—See COMPANY, 1.

*Weldon v. Dicks*, 10 Ch.D. 247, followed, 393.]—See COPYRIGHT, 2.

*Williams v. Preferred Mutual Accident Association*, 91 Ga. 698, distinguished, 411.]—See INSURANCE, 5.

*Wood v. Boosey*, L.R. 2 Q.B. 340, not followed, 393.]—See COPYRIGHT, 2.

## CERTIORARI.

See CRIMINAL LAW, 2.

## CHARITABLE USE.

See WILL, 3.

## COMPANY.

1. *Winding-up—Mortgage to Creditor—Setting Aside—Insolvency—Knowledge—“May be Set Aside”—Presumption—Rebuttal.*]—A mortgage of land made by an incorporated company in favour of a creditor within thirty days prior to the beginning of winding-up proceedings, was attacked by the liquidator as being void under some of the provisions of secs. 68 to 71, inclusive, of the Winding-up Act, R. S. C. ch. 129:—

*Held*, notwithstanding the fact that the mortgage was given upon demand of the mortgagee, that the transaction must be avoided under sec. 69, the mortgage being a conveyance for consideration, respecting real property, by which creditors were injured or obstructed, made by a company unable to meet its engagements; and it was not material under this section whether the mortgagee was or was not ignorant of such inability; but the transaction, being within the thirty days, was voidable, and should, therefore, be set aside, that

being the effect of the words "may be set aside."

*Held*, also, that the words of sec. 69, "upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders," were not applicable to the giving of a mortgage as security for a past debt.

*Held*, also, that none of the other sections relied on applied so as to avoid the mortgage; and, following *Lawson v. McGeoch* (1892-3), 22 O.R. 474, 20 A.R. 464, and distinguishing *Webster v. Crickmore* (1898), 25 A.R. 97, that the presumption referred to in sec. 71 is rebuttable. *Kirby v. Rathbun Company*, 9.

2. *Assignee for Creditors—Declaration of Trust—Right of Assignee to Sue—By-law—Calls—Time for Payment of—Forfeiture of Stock.*]—The plaintiff sued as an assignee for creditors under an assignment which excepted shares in companies not fully paid up, and in which his assignor was declared a trustee for the plaintiff, to transfer the shares in such way as he should direct. In this action the plaintiff sought to have it declared that he was the owner of certain shares, standing in the name of his assignor, in a company incorporated under R.S.O. 1897 ch. 191, and that he was entitled to pay the balance of calls made thereon:—

*Held*, that he was not en-

titled to call on the company to account to him for the shares or any dealings therewith.

Under sec. 35 of the above statute, stock may be forfeited by the company where the amount payable on a call is not paid within the time limited by the special Act incorporating the company, or by the letters patent, or by a by-law of the company.

Where, therefore, no time was limited in the statute, or letters patent, or in the by-law making the call, such call was held to be illegal and an attempted forfeiture of the stock ineffectual. *Armstrong v. Merchants' Mantle Manufacturing Co.*, 387.

3. *Voluntary Assignment by—Petition for Winding-up Order—Discretion.*]—Where the insolvency of the company is admitted, the Court has no discretion under sec. 9 of the Winding-up Act, R.S.C. ch. 129, to refuse to grant a winding-up order on the petition of a creditor who has a substantial interest in the estate, although the company has made a voluntary assignment for the benefit of its creditors, and most of them are willing that the winding-up should be under such assignment.

*Wakefield Rattan Co. v. Hamilton Whip Co.* (1893), 24 O.R. 107, not followed. *Re William Lamb Manufacturing Co. of Ottawa*, 243.

4. *Action — Wages — “Labourers, Servants, and Apprentices” — Mining Companies Act — Directors’ Liability — Summary Judgment — Con. Rule 616.*] — The plaintiff, the manager of a mining company, paid out of his own moneys the amount due for wages by the company to certain labourers, and having obtained assignments of their claims, recovered a judgment against the company for the amount, together with a sum of money owed to him by the company for services. After an execution against the company had been returned unsatisfied, he brought this action on behalf of himself and the labourers against two of the directors under sec. 8 of R.S.O. 1897 ch. 197, the Ontario Mining Companies Corporation Act, to make them personally liable for the amount due on the execution:—

*Held*, that the action brought against the company was not such a one as is contemplated under the section, and there being no dispute as to the facts, this action was dismissed on a motion under Con. Rule 616.

The manager of a mining company is not a “labourer, servant, or apprentice” within the meaning of sec. 8. *Herman v. Wilson*, 60.

See CONTRACT—MASTER AND SERVANT, 2 — RAILWAYS AND RAILWAY COMPANIES, 2.

## CONDITIONAL SALE OF CHATTELS.

See BILLS OF SALE, ETC.

## CONSTITUTIONAL LAW.

1. *Railways—Municipal Corporations—Construction of Highway Across Railway—Railway Committee of Privy Council—Railway Act of Canada, sec. 14—Intra Vires.*] — In an action to restrain the defendants from acting upon an order of the Railway Committee of the Privy Council, made under sec. 14 of the Railway Act of Canada, giving them the option to open a new street, by means of a subway, across the property and under the tracks of a Dominion railway company, but without compensation, and requiring the company to pay a portion of the cost of construction, and meanwhile allowing a temporary crossing for foot passengers only, and making certain other provisions upon the subject:—

*Held*, that the Provincial Legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question.

2. It has conferred such capacity.

3. In virtue of its power over property and civil rights in the Province, the Provincial Legislature has power to authorize a municipality to acquire and

make such a street, and to provide how and upon what terms it may be acquired and made.

4. But that power is subject to the supervision of federal legislation respecting works and undertakings such as the railway in question.

5. The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislation.

6. Such legislation may rightly confer upon any person or body the power to determine in what circumstances, and how and upon what terms, such a street may be acquired and made, or to prevent the acquiring and making of it altogether, and therefore sec. 14 of the Railway Act is not *ultra vires*.

7. Such legislation, in virtue of its power over such railway corporations, as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs, and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the Railway Committee, under sec. 14, in such a case as this.

8. Such legislation has not conferred upon the Committee power to give the temporary foot-way in question.

9. Nor any authority to delegate its powers.

10. The work it directs must be constructed under the supervision of an official appointed for that purpose by the Committee.

11. The railway company may, if they choose, construct the works directed, under such supervision, instead of permitting the municipality to do so. *Grand Trunk R.W. Co. v. City of Toronto*, 120.

2. *Indian Lands--Surrender--Treaty--Crown Patent--Precious Metals--Acquiescence.*—The judgment of BOYD, C., 31 O.R. 386, affirmed on appeal. *Ontario Mining Co. v. Seybold*, 301.

### CONTRACT.

*Road Company—Implied Covenant—Corporate Seal.*—An agreement in writing signed by the plaintiff and by the superintendent of the defendants' road, but not under seal, and not purporting to be made by the defendants, who were an incorporated road company, was in part as follows:—"I"—the plaintiff—"have this day agreed with" the defendants "to furnish good gravel and deliver the same in the centre of the road bed . . . and the company agree to pay me at the rate of \$2.40 per cord. . . . And it is further agreed that my tolls . . . shall be free during the full term of this agreement. And it is further agreed that in

consideration of this agreement and for the sum of \$1 . . . I do . . . discharge all claims I hold against the company . . . And it is further agreed that this agreement for gravel to hold good as long as the company keep the road and as long as my gravel holds good . . .

*Held*, that an agreement on the part of the defendants that they would take from the plaintiff all the gravel they should require for the portion of their road referred to in the writing, as long as he was able and willing to supply it, was not to be implied from the terms of the writing; and the taking of gravel from another person was not a breach of the agreement.

*Held*, also, *per* FERGUSON, J., that to bind the corporation by an executory contract to purchase from the plaintiff all the gravel required for a portion of their road for an indefinite and protracted period, would require an agreement under their corporate seal. *Hill v. Ingersoll and Port Burwell Gravel Road Co.*, 194.

*See* SALE OF GOODS.

## CONTRIBUTORY NEGLIGENCE.

*See* CARRIERS—NEGLIGENCE.

## CONVICTION.

*See* CRIMINAL LAW, 1, 2—MUNICIPAL CORPORATIONS, 1.

## COPYRIGHT.

1. *Works of Fine Art—Imperial Act—Non-Extension to the Colonies—25 & 26 Vict. ch. 68 (Imp.)*—The Imperial Act, 25 & 26 Vict. ch. 68, an Act for amending the law relating to Copyright in Works of Fine Art, does not extend to the colonies, and copyright thereby conferred is confined to the United Kingdom. *Graves v. Gorrie*, 266.

[Affirmed by a Divisional Court, 18th January, 1901.]

2. *Books—Infringement—5 & 6 Vict. ch. 45 (Imp.)—Application to Colonies—Importation of Foreign Reprints—Assignment of Proprietorship—Necessity for Registration—Status to Maintain Action.*—Upon a motion for an interim injunction restraining the defendants from importing into Canada for sale, and from exposing and offering for sale, copies of a book written by Francis Parkman, known as "A Half Century of Conflict," in infringement of the plaintiffs' copyright in such book, it appeared that at the time of the author's death he was the owner of and entitled to the copyright in such book for the British dominions, including Canada, and that after his death such copyright and ownership had been assigned and transferred to the plaintiffs by those upon whom they devolved; that the defendants had imported

copies of the book from the United States of America, and were offering them for sale in Canada :—

*Held*, that sec. 17 of the Imperial Act to amend the Copyright Act, 5 & 6 Vict. ch. 45, prohibiting the importation of foreign reprints by any person, not being the proprietor of the copyright or some person authorized by him, is now in force in Canada; and the plaintiffs were, therefore, entitled to prohibit the importation of foreign reprints into Canada.

2. But the plaintiffs had no right to maintain this action or proceeding, for, although they were the assignees of the proprietorship and ownership of the book, they had not complied with sec. 24 of 5 & 6 Vict. ch. 45, by causing an entry of their proprietorship to be made in the book of registry of the Stationers Company, the word "proprietor" in sec. 24 meaning the person who is the present owner of the work.

Dictum of Cockburn, L.C.J., in *Wood v. Boosey* (1867), L.R. 2 Q.B. 340, not followed.

*Weldon v. Dicks* (1878), 10 Ch. D. 247, and *Liverpool General Brokers' Association v. Commercial Press Telegram Bureaux*, [1897] 2 Q.B. 1, followed. *George N. Morang & Co., Limited v. The Publishers' Syndicate, Limited*, 393.

## COSTS.

*Scale of—Action in County Court—Amount in Controversy—Ascertainment—Division Court Jurisdiction.*]—See *Kreutziger v. Brox*, 418 (post DIVISION COURTS, 2).

See MASTER AND SERVANT, 2.  
—MUNICIPAL CORPORATIONS, 1, 2—SOLICITOR, 2—WILL, 3.

## COVENANT.

See CONTRACT—LANDLORD AND TENANT, 2—MORTGAGE, 1.

## CRIMINAL LAW.

1. *Theft—Summary Trial—Excessive Penalty—Amendment—Discharge—Further Detention—Criminal Code, secs. 752, 783, 787, 800.*]—The defendant was prosecuted for stealing \$5 in money, the property of one J.M., contrary to the form of the statute, etc., and the charge was heard and determined in a summary way by a Police Magistrate :—

*Held*, that the prosecution fell under sec. 783 (a) of the Criminal Code, the value of the property being less than \$10, and it not being charged that the offence was "stealing from the person;" and therefore sec. 787 applied, and the magistrate had no power to impose a penalty of imprisonment for longer than six months.

The provisions of the Code respecting amendments to summary convictions do not apply to summary trials; and the provisions of sec. 800 do not apply where the same infirmity is found in the conviction as in the commitment.

The conviction and commitment were bad for imposing an unauthorized penalty; the defendant was entitled to be discharged upon *habeas corpus*; and an order should not be made under sec. 752 for his further detention. *Regina v. Randolph*. 212.

2. "*Appear the Keeper of House of Ill-fame*"—*Conviction—Certiorari—Pleading Guilty—Summary Convictions Clauses of the Code—Trial on the Merits.*—The offence of being a keeper of a house of ill-fame is an indictable offence, and it may be tried either before a jury in the ordinary way or before a police magistrate under the summary trial clauses or before a justice of the peace under the summary convictions clauses of the Code.

A prisoner was convicted by a police magistrate, after pleading guilty to the charge that she did "unlawfully appear the keeper of a house of ill-fame," and was sentenced to be imprisoned for one year in the Andrew Mercer reformatory:—

*Held*, that the conviction might be treated as having been made under the summary con-

victions clauses of the Code, although the sentence exceeded the power of the magistrate, and that such conviction might be supported and the sentence amended under those clauses:—

*Held*, also, that where a prisoner charged before a magistrate with unlawfully appearing the keeper of a house of ill-fame had pleaded guilty to such charge, there was a trial on the merits, and that such person was to be deemed guilty of the offence of keeping a house of ill-fame. *Regina v. Spooner*, 451.

#### CROWN LANDS.

*Patent—Locatee—Improvements—Claim for.*—On an application being made for the patent to certain lands, a claim was made by the defendant, who had married the widow of the locatee, and had improved the land, to be allowed the value of such improvements, whereupon the Commissioner of Crown Lands directed that, before the patent issued, the amount, if any payable to the defendant for his improvements and work on the land, after proper deductions, should be ascertained. A consent judgment was obtained referring it to the Master to inquire and report as to what sum, if any, the defendant was entitled to for permanent improvements and work done upon the land; for maintenance of the family of the locatee; and for any advances

made to them, after making all proper deductions:—

*Held*, that while the consent judgment was silent as to the principle to be applied in ascertaining the amount payable to the defendant for the improvements, etc., having regard to the object of the Crown Lands Department, the proper mode was to award such sum as *in foro conscientiae* the defendant ought to receive. *Highland v. Sherry*, 371.

See CONSTITUTIONAL LAW, 2.

### DAMAGES.

See MUNICIPAL CORPORATIONS, 3, 4—SALE OF GOODS.

### DEATH.

See EXECUTORS AND ADMINISTRATORS.

### DEBENTURES.

See ASSESSMENT AND TAXES, 1.

### DEED.

*Construction—Gravel—Subsequent Deposit.*—In 1856 the owner of land by deed conveyed to a railway company “the gravel situate and being on and comprised within a certain part” of the land, with the right of way for a railway track and the free and unobstructed use there-

of, and covenanted for quiet possession, free from incumbrances, of the gravel and other the premises conveyed. Subsequently the company removed all the gravel which was on the land at the date of the deed:—

*Held*, that gravel deposited on the land after the date of the deed, owing to the action of the waters of the lake, did not pass by the conveyance. *Mann v. Grand Trunk R. W. Co.*, 240.

[On appeal by the defendants from this decision, the Court of Appeal, on the 13th March, 1901, gave them the option of a new trial upon payment of costs, and in default dismissed the appeal with costs.]

See ELECTION.

### DEFAMATION.

*Slander—Privileged Occasion—Malice—What Constitutes—Misdirection—New Trial.*—In an action for slander, where the occasion was privileged, the Judge at the trial in defining malice, which it was essential for the plaintiff to prove, told the jury that it consisted of a reckless statement, of a statement not true, made without consideration of what the probable consequences might be to another person, and of a statement not made in good faith—not truly, but wantonly and recklessly, and without proper consideration:—

*Held*, misdirection, for it should have been left to the jury to say whether the defendant acted



through a wrong feeling in his mind against the plaintiff—some unjustifiable intention to do him wilful injury; and a new trial was directed. *English v. Lamb*, 73.

2. *Trial—Nonsuit After Verdict — Innuendoes — Onus — Evidence for Jury—Newspaper—Report of Speech — “Black-mailing,” Meaning of—Truth of Defamatory words.*—Where, in the course of the trial of an action before a Judge and jury, a motion for a nonsuit is made at the close of the plaintiff's case, and again at the close of the whole evidence, and the Judge adopts the course of taking a verdict, and of fully hearing and considering the motion, if necessary, after the verdict, the Judge may, in a proper case, nonsuit the plaintiff, notwithstanding a verdict of the jury in his favour.

*Perkins v. Dangerfield* (1879), 51 L.T.N.S. 535, and *Connecticut Mutual Life Ins. Co. of Hartford v. Moore* (1881), 6 App. Cas. 644, distinguished.

*Floor v. Michigan Central R. W. Co.* (1900), 27 A.R. 122, 127, specially referred to.

In an action for libel the words complained of were: “It can be readily understood what interest Mr. M. has in the matter, and why he should make advances, hire committee rooms, and generally control the campaign, when \$4,000,000, which he controls, will be made avail-

able if (the plaintiff) can be elected mayor. In addition to this, Mr. M. has between \$7,000 and \$10,000 of claims against (the plaintiff), which in proceedings it was shewn under oath of Mr. M. that he hoped to be paid, should he succeed in qualifying (the plaintiff) for mayor, and then electing him.”

The innuendo was, that the defendants charged the plaintiff with having “entered into a corrupt arrangement” with one M., “whereby the plaintiff should use the office of mayor, when elected, for private gain,” and with having “unlawfully and corruptly influenced or attempted to influence the said M. to support him in the mayoralty campaign, both financially and otherwise,” and with being “unlawfully and corruptly influenced” by said M. “to use the said office of mayor to improperly advance the pecuniary and private undertakings of said M.”—

*Held*, that, there being no evidence apart from the newspaper article in which they appeared, to shew that the words bore any other than their ordinary meaning, the onus of proof of the innuendo was not satisfied; there was no reasonable evidence to go to the jury that the words conveyed the meaning which the plaintiff attributed to them.

The plaintiff also complained of a statement published by the

defendants, that a speaker at a public meeting "characterized" the plaintiff's behaviour as "blackmailing." The defendants pleaded the truth of the words used:—

*Held*, that it made no difference that the defendants were only reporting, or purporting to report, the words of another, or whether the report was accurate or inaccurate — that question arises on a defence of fair and accurate report only. If the words were true, the plaintiff could not recover.

The word "blackmailing" should not, at the present day and in this country, be limited in its meaning to the case of the crime of extortion by threats, or any other crime.

Where a man, having no right, nor any pretence of right, to receive one farthing (except his proper law costs, if he succeed in the action), receives \$4,500 to hush a complaint of, and to stifle his legal proceedings to prevent, a wrong which he charges is about to be perpetrated by means of audacious bribery of public officers, his conduct may be "characterized as blackmailing" in the proper and ordinary meaning of these words.

There being no evidence of the falsity of the words used, but they appearing, upon uncontroverted evidence, to be true, the plaintiff's case failed.

*Semble*, also, that the innuendoes that the plaintiff "had com-

mitted a crime punishable by law," that he was "unworthy of any position of trust," and that he "was a blackmailer," could not be supported.

*Quære*, whether the plaintiff, having chosen to put his own interpretation upon the words, and to bring the defendants down to trial upon that interpretation, and to try the case out accordingly, could be permitted subsequently to reject the innuendoes, and rely upon the words (if untrue) having another libellous meaning, whether libellous in themselves or not.

The respective functions of Judge and jury are in an action of libel in no way different from such functions in other actions, except for the statutory provision in favour of a defendant, R.S.O. 1897 ch. 68, sec. 2.

It is the duty of the Court to consider whether there is any reasonable evidence to go to the jury, and, if not, to dismiss the action. *Macdonald v. Mail Printing Co.*, 163.

3. *Privilege—Interest—Publication to Clerk—Finding of Jury.*—One of the defendants, the secretary of a trade association, prepared a statement for circulation among the members of the association, and gave it to a person whom he occasionally employed, with instructions to copy it. This statement contained an allegation that the plaintiff was unworthy of credit:—

*Held*, that, as the publication to the members of the association would have been privileged, in the absence of malice, on the ground of interest, the publication to the copyist was also privileged, being a reasonable means employed to make the communication to the others.

*Lawless v. Anglo-Egyptian Cotton and Oil Co.* (1869), L.R. 4 Q.B. 262, followed.

*Held*, also, that the finding of the jury that "there was no ground of action" was in effect a finding that the words were not defamatory. *Harper v. Hamilton Retail Grocers' Association*, 295.

#### DEVOLUTION OF ESTATES ACT.

*Payment of Debts—Distinction between Real and Personal Property.*]—The Devolution of Estates Act, R.S.O. 1897 ch. 127, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts; but, except in the case of a residuary devise specially provided for by sec. 7, the order in which different classes of property are applicable to the payment of debts has not been changed by the Act. *Re Hopkins Estate*, 315.

#### DIRECTORS.

See COMPANY, 4—RAILWAYS AND RAILWAY COMPANIES, 2.

#### DISCOVERY.

See BANKRUPTCY AND INSOLVENCY, 1.

#### DISCRETION.

See ADMINISTRATION—COMPANY, 3.

#### DISTRESS.

See ASSESSMENT AND TAXES, 3—MUNICIPAL CORPORATIONS, 1.

#### DIVISION COURTS.

*Claim beyond Jurisdiction—Amendment at Trial—Waiver—Prohibition.*]—A Division Court Judge has power to allow a plaintiff to amend his particulars at the trial so as to bring within the jurisdiction a case which, from the nature of the cause of action, was, as originally launched, outside it; and where in such a case the defendant did not insist on re-service of the summons, but answered the claim, and the trial proceeded and the Judge found facts shewing jurisdiction, upon which judgment was entered, prohibition was refused. *In re Sebert v. Hodgson*, 157.

2. *Jurisdiction—Ascertainment of Amount—Balance due on Contract—Extrinsic Evidence—Costs—Scale of.*]—In an action in the County Court for \$37.50, balance due on a building

contract of \$475, signed by the defendant, where extrinsic evidence was required to shew performance of the contract by the plaintiff, and for an open account for \$27.35, against which the defendant was allowed \$25 for defective work and material:—

*Held*, that the Division Court had no jurisdiction, and that the plaintiff was entitled to his costs on the County Court scale. *Kinsey v. Roche* (1881), 8 P.R. 515, approved of *McDermid v. McDermid* (1888), 15 A.R. 287, followed. *Re Graham v. Tomlinson* (1888), 12 P.R. 367, not followed. *Kreutziger v. Brox*, 418.

3. *Jurisdiction—Ascertainment of Amount—Promissory Note—Agent.*—*See Davidson v. McClelland*, 382 (*post* HUSBAND AND WIFE).

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### DONATIO MORTIS CAUSÂ.

*See* GIFT.

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### DOWER.

*See* WILL, 4.

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### DRAINAGE.

*See* MUNICIPAL CORPORATIONS, 4.

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### ELECTION.

*Husband and Wife—Separation Deed—Benefits under Hus-*

*band's Will.*—A husband in a separation deed covenanted to pay his wife an annuity of \$200 as follows: \$100 on the 1st of June and December in every year: and charged it on certain land, the wife accepting it in full satisfaction for support, maintenance, and alimony during coverture, and of all dower in his lands then or thereafter possessed.

The husband by his will, subsequently executed, directed his executors to pay his wife \$400 annually; \$200 on the 1st of June and December in each year during her life: and added, "which provision in favour of my said wife is made in lieu of dower:—"

*Held*, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both. *Carscallen v. Wallbridge*, 114.

*See* WILL, 4.

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### ESTATE.

*See* TENANT FOR LIFE.

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### EVIDENCE.

*Estate of Deceased—Corroboration—Inference from Facts—Interested Party.*—In an action by or against the representatives of a deceased person, the corroborative evidence required by R.S.O. 1897 ch. 73, sec. 10, may be found in the other facts

adduced in the case, raising a natural and reasonable inference in support of the evidence, whereof corroboration is required.

*Semble*, corroborative evidence within the meaning of that enactment may be given by an interested party so long as he is not the party obtaining the decision. *In re Curry, Curry v. Curry*, 150.

2. *Right to Contradict One's Own Witness—Facts Material to the Issue—Judge's Leave—Refusal.*]—Where a witness (whether party to the action or not) is called to prove a case, and his evidence disproves it, the party calling him may yet establish his case by other witnesses, called not to discredit the former, but to contradict him on facts material to the issue; and the right to contradict by such other evidence exists without leave of the Judge at the trial.

Judgment of *MACMAHON, J.*, reversed. *Stanley Piano Company of Toronto v. Thomson*, 341.

3. *New Evidence on Appeal—Rule 498—County Court Appeal—R.S.O. 1897 ch. 55, sec. 51, sub-sec. 3—New Trial—Time.*]—*See Butler v. McMicken, 422 (post JUDGMENT, 2.)*

*See DEFAMATION, 2.*

## EXAMINATION.

*See BANKRUPTCY AND INSOLVENCY, 1.*

## EXECUTION.

*See COMPANY, 4—LANDLORD AND TENANT, 2.*

## EXECUTORS AND ADMINISTRATORS.

*Fatal Accident Act—Death of Beneficiary—Survival of Action.*]—An action under the Fatal Accident Act, R.S.O. 1897 ch. 166, by the personal representative of the deceased for the benefit of a beneficiary, survives on the death of the latter, and may be continued on representation being obtained to the estate of the beneficiary. *McHugh v. Grand Trunk R. W. Co.*, 234.

*See DEVOLUTION OF ESTATES ACT—EVIDENCE, 1—REVENUE.*

## FACTORIES ACT.

*See MASTER AND SERVANT, 3.*

## FATAL ACCIDENT ACT.

*See EXECUTORS AND ADMINISTRATORS.*

## FIRE INSURANCE.

*See INSURANCE, 2, 3.*

**FORFEITURE OF STOCK.**

See COMPANY, 2.

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**GIFT.**

*Donatio Mortis Causa*—*Bank Deposit Book.*]—A banker's pass book, which is numbered, and in which it is stipulated that deposits recorded in it will not be repaid without its production, is a proper subject of *donatio mortis causa*, and delivery of such a book in anticipation of death operates as a transfer of the debt to take effect upon death. *Brown v. Toronto General Trusts Corporation*, 319.

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**GUARANTY.**

See PRINCIPAL AND SURETY.

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**HIRE RECEIPT.**

See BILLS OF SALE, ETC.

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**HUSBAND AND WIFE.**

*Sale of Goods*—*Undisclosed Principal*—*Judgment Against Husband and Wife*—*Married Woman's Act*—*Division Court*—*Jurisdiction of.*]—A husband, as agent for his wife, purchased goods from the plaintiffs, who were ignorant that she was the purchaser. On becoming aware of it, and the goods not having been paid for, they sued both

husband and wife, but on the husband giving a promissory note signed by him for part of the debt, and the wife paying the balance in cash, the action was not further proceeded with. The note not having been paid at maturity, an action was brought in a County Court for the balance due on the goods, being the amount for which the note had been given, and judgment was entered against both husband and wife:—

*Held*, on appeal, that the proper inference was, that the husband's note was not taken in satisfaction of the debt, nor was it an election to look to him alone for payment; and the plaintiffs were therefore entitled to sue on the original cause of action; but that they could not have judgment against both husband and wife, and must elect as to which they desired to hold it, and that they could properly hold it against the wife, a recovery against her being now maintainable under the Married Woman's Property Act, R.S.O. 1897 ch. 168.

*Wagner v. Jefferson* (1876), 37 U.C.R. 551, distinguished.

*Held*, also, that the debt was not cognizable by the Division Court, the claim not having been ascertained by the signature of the wife; that the note signed by the husband could not be treated as such, it not having been signed by the husband as her agent, but as his own

promise. *Davidson v. McClelland*, 382.

See ADMINISTRATION—ELECTION  
—WILL, 4.

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### IMPLIED COVENANT.

See CONTRACT.

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### IMPROVEMENTS.

See CROWN LANDS.

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### INDIAN LANDS.

See CONSTITUTIONAL LAW.

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### INDICTMENT.

See MUNICIPAL CORPORATIONS, 5.

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### INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

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### INSURANCE.

*Life—Change of Beneficiary—Preferred Class—Beneficiary for Value—Will—Premiums Paid by Beneficiary.*—A person whose life was insured by a benevolent society in favour of his wife, who was a beneficiary for value, though not stated to be so in the certificate, was unable or unwilling to keep the insurance in force, and the later assessments before his death were paid by the wife. By his

will the assured gave the whole of the insurance moneys to one of his sons:—

*Held*, that he had power to do so by virtue of sec. 160 of the Ontario Insurance Act, R.S.O. 1897 ch. 203, the proviso at the end of sub-sec. (2) shewing that the section is applicable to the case of a beneficiary for value, and that those only who appear as such expressly in the policy are protected against the wide power to change beneficiaries conferred by the section.

It was conceded that the wife should have a return of all moneys paid by her to keep the certificate in force, with interest. *Book v. Book*, 206.

2. *Fire—Prior Insurance—Renewal of Policy—Effect of.*—Where, at the time of effecting an insurance against fire, there was a prior insurance in force, as to which no statement was made, either in the application or policy issued thereon, the renewal of such policy, without any such statement being then made, the prior insurance having then expired, does not validate the policy, the renewal being merely a continuation of the policy, and not a new insurance. *Agricultural S. and L. Co. v. Liverpool and London and Globe Ins. Co.*, 369.

3. *Fire—Apprehension of Incendiary Danger—Application Filled in by Local Agent—Untrue Answer.*—An applica-

tion for insurance on the contents of a barn contained the question "Is there any incendiary danger threatened or apprehended?" to which the answer was "No." The plaintiff, who had not previously carried any insurance, stated that he effected the insurance, having learned that the owner of the barn had placed a high insurance on it, as well as on the adjacent dwelling-house. This was told by the plaintiff to the company's agent, who filled in the application and the answers to the questions. The application was then signed by the applicant, who was not an illiterate man, but he did not read over the application, and was not told that the question had been answered in the negative:—

*Held*, that the plaintiff was bound by his untrue answer to the question, it being material to the risk, for the reasonable inference was that the apprehension of incendiary danger as a fact existed.

*Graham v. Ontario Mutual Ins. Co.* (1887), 14 O.R. 318, *Chatillion v. Canadian Mutual Fire Co.* (1877), 27 C.P. 450, considered and commented on.

*Quære*, whether the inquiry raised by the question was not as to the apprehension of the applicant of incendiary danger, and not whether, as a fact, any incendiary danger was to be apprehended. *Kniseley v. British America Ass. Co.*, 376.

4. *Accident—Hazardous Occupation—Voluntary Exposure—Unnecessary Danger.*—The insured, who was a baggageman at a railway station, received the injuries which caused his death while in the act of coupling cars, which was not part of his duty as baggageman. The evidence shewed that he had coupled cars on other occasions, and that on this occasion he understood the brakeman to request him to make the coupling. In his application for an accident insurance policy he was described as a baggageman, and in the policy there was the following clause, which was also contained in the application: "1. If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." By clause 4 it was provided that the contract should not cover death resulting from "voluntary exposure to unnecessary danger:—"

*Held*, that the words "occupation or exposure" did not apply to the insured's casual act of coupling, nor was there "voluntary exposure to unnecessary danger." *McNevin v. Canadian Railway Accident Ins. Co.*, 284.

5. *Accident—"Immediately" Disable*—*Causation or Time—Notice—Condition Pre-*



*cedent.*]—The defendants insured the plaintiff against accident by a policy containing a clause providing that if “accidental injuries . . . shall immediately, continuously, and wholly disable and prevent the assured from pursuing his usual business or occupation,” etc., they would pay a certain weekly allowance during a limited period.

The plaintiff was injured accidentally within the meaning of the policy, but did not become wholly disabled until three months afterwards, when he notified the company:—

*Held*, that the word “immediately” in the clause had relation to causation and not to time, and that the plaintiff was entitled to recover. *Williams v. Preferred Mutual Accident Ass'n.* (1893), 91 Ga. 698, and *Merrill v. Travellers Insurance Co.* (1895), 91 Wis. 329, distinguished.

The policy also contained a clause providing that written notice must be immediately given to the company at the office in Montreal . . . and “that if in any other respect the conditions of this insurance are disregarded all rights hereunder are forfeited to the corporation:”—

*Held*, that the giving of notice forthwith was not thereby made a condition precedent to the right of recovery on the policy. *Shera v. Ocean Accident and Guarantee Corporation* 411.

## INTOXICATING LIQUORS.

*Liquor License Act—Local Option By-law—Omission to name Deputy Returning Officers in.*]—When a by-law requires the assent of the electors, the deputy returning officers to take their votes must be named therein, and a by-law passed under sec. 141 of the Liquor License Act, R.S.O. 1897 ch. 245, which omitted their names, was quashed. *Re McCartee and Township of Mulmur*, 69.

## JUDGMENT.

1. *Foreign Judgment—Warrant of Attorney—Confession—Jurisdiction.*]—The general rule is, that a judgment valid by the laws and practice of the state where it is rendered or confessed, may be sued upon as a ground of action in any other state.

A judgment by confession is an instance of a party voluntarily submitting himself to the jurisdiction of the Court whereby competence is acquired to deal with the matter submitted.

*Held*, that a judgment recovered in the State of Pennsylvania, after the defendant had ceased to reside in that State, upon a warrant of attorney in favour of any attorney of a court of record, executed while the defendant was a resident of the State, was valid, and that the courts there had jurisdiction to

deal with the matter, and over the person of the defendant.

Judgment of MACMAHON, J., affirmed. *Ritter v. Fairfield*, 350.

2. *Action on — Period of Limitation—Renewal of Writ—Order nunc pro tunc—Jurisdiction — New Evidence on Appeal.*] — Notwithstanding R.S.O. 1877 ch. 108, sec. 23 (see R.S.O. 1897 ch. 133, sec. 23) twenty years is the period of limitation applicable to an action on a judgment of a court of record.

*Boice v. O'Loane* (1878), 3 A.R. 167, and cases following it, followed in preference to *Jay v. Johnston*, [1893] 1 Q.B. 25, 189.

*Trimble v. Hill* (1879), 5 App. Cas. 342, at p. 344, specially considered.

The renewal of a writ of summons after its expiration is matter of judicial discretion, and when a County Court Judge had so renewed such a writ as to defeat the operation of the Statute of Limitations, and the defendant made no attempt to appeal from his order, but appeared to the writ without objection, a Divisional Court, on appeal from the judgment in the action, refused to entertain an objection to the validity of the writ.

Under Rule 498 the Court may entertain an application to admit new evidence in a proper case on a County Court appeal, notwithstanding R.S.O. 1897 ch.

55, sec. 51, sub-sec. 3, under which such an application must be made before the County Court, and this although the time for applying for a new trial had expired. *Butler v. McMicken*, 422.

3. *Summary Judgment—Dismissal of Action—Rule 616.*] — See *Herman v. Wilson*, 60 (*ante* COMPANY, 4.)

See PRINCIPAL AND AGENT — SALE OF GOODS.

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## JURISDICTION OF COUNTY COURT JUDGE.

See MUNICIPAL CORPORATIONS, 2.

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## JURISDICTION OF DIVISION COURTS.

See DIVISION COURTS, 1, 2—HUSBAND AND WIFE.

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## JURISDICTION OF HIGH COURT.

See JUDGMENT, 12 — PRINCIPAL AND AGENT—TRUSTS AND TRUSTEES.

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## JURY.

See DEFAMATION, 2, 3—MASTER AND SERVANT, 1—PRINCIPAL AND AGENT—TRIAL.

**LANDLORD AND TENANT.**

1. *Renewable Lease—Construction of Renewal Clause—Increased Rent.*—A renewable lease provided that renewals should be at such "increased" rent as should be determined by arbitrators "payable in like manner and under and subject to the like covenants, provisions, and agreements as are contained in these presents." The lease further provided for the payment of the yearly rent as follows: "For the first ten years of the said term \$80 per annum; for the remaining eleven years \$100 per annum:"—

*Held*, that the proper method of increasing the rent on renewal was by adding to the rent of \$80 per annum for the first ten years, and to the rent of \$100 per annum for the remaining eleven years of the renewal term.

*Held*, also, that the condition as to the rent for the new term being an increased rent, might be satisfied by making a merely nominal addition, there being no increase in the rental value of the premises. *In re Geddes and Garde*, 262.

2. *Landlord and Tenant—Covenant—Use of Hay on the Premises—Execution—Rights of Execution Creditor.*—Plaintiff leased a farm as a dairy farm and a number of cows, the lease containing the following clause: "All the hay, straw, and

corn stalks raised on the . . . farm to be fed to the same cows on the . . . farm:"—

*Held*, that while the property in hay produced on the farm might be legally in the tenant, yet his contract was so to use it that it should be fed to the cattle and consumed on the premises, and that he could not have the beneficial use of it or take it off the farm, and an execution creditor of his had no higher right than he had.

Judgment of the County Court of Stormont, Dundas, and Glengarry reversed. *Snetzinger v. Leitch*, 440.

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**LEASE.**

*See* LANDLORD AND TENANT—TENANT FOR LIFE.

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**LIBEL.**

*See* DEFAMATION, 2, 3.

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**LIEN.**

1. *Mechanics' Lien—"Notice in Writing" to Owner—Letter.*—The claimants of a mechanics' lien for materials wrote to the owner a letter asking him, when making a payment to the contractor "on the Lisgar street buildings"—the property on which the lien was asserted—to "see that a cheque for at least \$400 is made payable to us on account of brick delivered, as

our account is considerably over \$700, and we shall be obliged to register a lien if a payment is not made to-day:"—

*Held*, MEREDITH, J., dissenting, a sufficient "notice in writing" of their lien, under sub-sec. 2 of sec. 11 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897 ch. 153. *Craig v. Cromwell*, 27.

[Affirmed, 27 A.R. 585.]

2. *Mechanics' Lien—Trial—Procedure—Mortgagee—Materials on Land.*]—The procedure for the trial of an action under the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897 ch. 153, is the ordinary procedure of the High Court, which is not affected by secs. 35 and 36 of the Act; and, therefore, a prior mortgagee against whom relief is sought must be made a party to the action within the time limited by sub-sec. 1 of sec. 24.

Materials were placed on the land by the owner thereof and paid for by the mortgagee, to be used in the construction of buildings being erected thereon, but were not actually incorporated therein.

The materials were taken by the owner to a planing mill to be planed for placing in the buildings, and having been left there for some time, and storage charges incurred, the mortgagee sold them to the mill-owner.

Per MEREDITH, C.J.—No lien attached on such materials, the

incorporation thereof in the building being an essential element.

Per ROSE and MACMAHON, JJ.—A lien would attach, notwithstanding the absence of such incorporation, but there having been a conversion, no relief could be granted, for there is nothing in the Act enabling the Court to assess damages which could be made applicable to lienholders. *Larkin v. Larkin*, 80.

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## LIFE INSURANCE.

See INSURANCE, 1,

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## LIMITATION OF ACTIONS.

See JUDGMENT, 2.

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## LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS.

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## LOCAL OPTION.

See INTOXICATING LIQUORS.

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## LOCATEE.

See CROWN LANDS.

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## MALICE.

See DEFAMATION, 1.

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## MARRIED WOMAN.

See HUSBAND AND WIFE.

**MASTER AND SERVANT.**

1. *Injury to Servant—Foreman—Negligence—Evidence—Finding of Jury.*—Judgment of MACMAHON, J., 31 O.R. 521 reversed. *Kelly v. Davidson*, 8.

[Affirmed, 27 A.R. 657.]

2. *Secret Profits in Service—Costs—Jus Tertii.*—Profits acquired by the servant or agent in the course of or in connection with his service or agency fall to the master or principal.

The manager of a cold storage company, at the request of the company, undertook to advise a meat company as to some changes in their plant, and used his position as adviser to influence the purchase by the meat company of a new plant from the defendants, who promised him a commission on any order they might receive through his assistance. This was not disclosed to his employers or the meat company:—

*Held*, that the transaction was one in connection with his service as manager of the cold storage company, and he could not recover a commission from the defendants.

The defendants having at first conceded the plaintiff's right to recover, and then paid the money to the cold storage company, taking a bond of indemnity, the action was dismissed without costs. *Jones v. Linde British Refrigeration Co.*, 191.

3. *Injury to Servant—Negligence of Fellow-Servant—Workmen's Compensation Act—Factories Act—Elevator—Mechanical Device.*—The plaintiff was employed as a dressmaker in the defendants' departmental store, and, while descending in their elevator after her day's work was done, was injured by the fall of the elevator.

Apart from a question as to the defective condition or arrangement of the safety appliances in connection with the elevator, the cause of the fall was the failure of the person in charge to properly manage the elevator and to use the brake for the purpose of controlling, and which, but for that failure, would have controlled, its movements:—

*Held*, that the defendants were not answerable at common law for such neglect, which was that of the plaintiff's fellow-servant, nor under the Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, for the fellow-servant was not a person having any superintendence intrusted to him, within secs. 2 (1) and 3 (2).

By sec. 20, sub-sec. 1 (*d*), of the Ontario Factories Act, R.S.O. 1897 ch. 256, in every factory all elevator cabs are to be provided with some suitable mechanical device to be approved by the inspector, whereby the cab will be securely held in the event of accident:—

*Held*, that the defendants' store was a factory within the meaning of the Act, and the onus of proving that the brake and "dogs" in use in connection with the elevator were suitable was upon the defendants; but it was not necessary for them to shew that the device in its concrete form as part of the elevator had been approved; it was sufficient that the kind of device used had been approved.

*Held*, also, that, in order to render the employers liable to a civil action, it was incumbent on the plaintiff to make out the causal connection between the omission to provide the statutory safeguards and the injury complained of; and that she had not done. *Carnahan v. Robert Simpson Co.*, 328.

See COMPANY, 4.

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### MAXIM.

*Ignorantia juris neminem excusat.*]—See WILL, 4.

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### MECHANICS' LIENS.

See LIEN.

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### MILITIA ACT.

See TRADE UNION.

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### MINING COMPANY.

See COMPANY, 4.

### MORTGAGE.

*Covenant of Mortgagor—Enforcement—Dealings between Mortgagee and Assignee of Equity.*]—The relations which exist among mortgagee, mortgagor, and assignee of the land who has agreed to pay the mortgage, are not those which obtain among creditor, surety, and principal debtor.

*Aldous v. Hicks* (1891), 21 O.R. 95, approved.

Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor where no actual prejudice has arisen.

So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land; and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights.

*Mathers v. Helliwell* (1863), 10 Gr. 172, explained.

Dictum of MacLennan, J.A., in *Trust and Loan Co. v. McKenzie* (1896), 23 A.R. 167, dissented from.

*Barber v. McCuaig* (1897-8), 24 A.R. 492, 29 S.C.R. 126, followed. *Forster v. Ivey*, 175.

2. *Sale under Power—Tender of Redemption Money—Time and Place of—Reasonable Tender.*—The defendants advertised an auction sale of mortgaged lands situate near Kincardine to take place there on the 19th January. At eleven a.m. on the 17th January the mortgagor telegraphed to the defendants at Toronto to inquire the amount required to redeem it, and the defendants telegraphed a reply. At ten a.m. on the 19th January the defendants received at Toronto the amount named, but, in accordance with their office procedure, the accountant was not aware of this till about eleven a.m., when, knowing the property was up for sale, he telegraphed and telephoned the fact to Kincardine. The sale had, however, been made a few minutes before to the plaintiff. The defendants then returned the money to the mortgagor:—

*Held*, that the plaintiff was entitled to specific performance, for the mortgagor had not tendered the amount at such reasonable time before the sale as to make it obligatory on the defendants to receive it in payment. *Gentles v. Canada Permanent and Western Canada Mortgage Corporation*, 428.

See COMPANY, 1—LIEN, 2

### MORTMAIN.

See WILL, 3.

### MUNICIPAL CORPORATIONS.

1. *By-law—Transient Traders—Conviction—Penalty—Costs—Imprisonment—Distress.*—The defendant was convicted before a justice of the peace for that she did on a certain day, and at other times since, occupy premises in the town of B., and did carry on business on said premises by selling dry-goods, she not being entered on the assessment roll of the town for income or personal property for the current year, and not having a transient trader's license to do business in the town, as required by a certain by-law of the town; and was adjudged for her offence to forfeit and pay the sum of \$50 (to be applied on taxes to become due) to be paid and applied according to law, and also to pay to the justice the sum of \$11.45 for his costs in that behalf; and if these sums were not paid forthwith, she was adjudged to be imprisoned.

The first clause of the by-law provided that every transient trader who occupied premises in the municipality and who was not entered in the assessment roll, and who might offer goods or merchandise for sale, should take out a license from the municipality. The second clause provided that every other person who occupied premises in the municipality for a temporary period should take out a license. The eighth clause provided for

the imposition of a penalty for a breach of any of the provisions of the by-law, and that, in default of payment of the penalty and costs, the same should be levied by distress, and authorized imprisonment in default of distress:—

*Held*, that the defendant was not brought within either the first or second clause of the by-law, as it was not alleged or charged that she was a transient trader or that she occupied premises in the municipality for a temporary period; and these omissions were fatal to the conviction.

*Regina v. Caton* (1888), 16 O.R. 11, followed.

*Held*, also, that the conviction was open to objection because of the application of the penalty, the award of the costs to the justice, instead of to the informant, and the award of imprisonment upon default in payment of the penalty.

The conviction was quashed, and costs were given against the informant. *Regina v. Roche*, 20.

2. *Bonus By-law—Scrutiny—Costs—Successful Party—Jurisdiction—R.S.O. 1897 ch. 223, sec. 372.*—Under sec. 372 of the Municipal Act, R.S.O. 1897 ch. 223, a County Court Judge, on a scrutiny of the ballot papers cast on the voting for a bonus by-law, cannot award costs against the corporation if it be successful in upholding the by-

law. *Township of Aldborough v. Schmeltz*, 64.

3. *Damages—Non-repair of Highway—Notice of Accident—Joint Liability—Waiver.*—

The notice of the accident and the cause thereof required by sec. 606 (3) of the Municipal Act, R.S.O. 1897 ch. 223, to be given within thirty days after the accident, must now, by 62 Vict. (2) ch. 26, sec. 39, be given to each of the municipalities where the claim is against two or more as jointly responsible for the repair of the road. *Leizert v. Township of Matilda* (1899), 26 A.R. 1, is therefore not now applicable.

Where notice in writing was given to one township municipality of two sued as jointly liable, and not to the other, but it appeared that the reeve of the latter had been verbally notified by the plaintiff and had then promised to write and had written to the reeve of the former, after which both Reeves attended with the plaintiff and examined the place of the accident, and the reeve of the latter afterwards wrote to the plaintiff advising him that the township corporation did not recognize his claim because it was considered that the loss arose from the fault of the plaintiff; and all this within thirty days after the accident:—

*Held*, that there was no waiver. *Jones v. Township of Stephenson*, 226.



4. *Drainage By-Law—Petition for—Qualification of Petitioners*—"Last revised Assessment Roll"—"Exclusive of farmers' sons not actual owners"—*Meaning of—Interest in Land—Invalid By-Law—Damages.*—The assessment roll last revised previous to the passing of a drainage by-law is the one to be looked at for the purpose of ascertaining whether the petition for the work was sufficiently signed to authorize the passing of the by-law.

The words "exclusive of farmers' sons not actual owners" in sub-sec. 1 of sec. 3, R.S.O. 1897 ch. 226, do not refer to farmers' sons who are not actual owners in fact, but to farmers' sons so shewn by the last revised assessment roll.

An arrangement between a farmer and his sons by which he promised to convey the farm to them, he retaining a life interest, is sufficient to give them an interest in the land of a freehold nature, entitling them to be assessed as joint owners, and, so assessed, they are not "farmers' sons not actual owners."

The by-law in question in this action was declared invalid, the petition therefor not having been properly signed within the meaning of sec. 3, but not having been quashed, the plaintiff was held not entitled to damages for work done under it.

*Connor v. Middagh and Hill v. Middagh* (1889), 16 A.R. 356, and *McCulloch v. Township of*

*Caledonia* (1898), 25 A.R. 417, followed. *Challoner v. Township of Lobo*, 247.

[Reversed by the Court of Appeal, 1 O.L.R. 156.]

5. *Prosecution for Nuisance—Non-Repair of Street—Preliminary Inquiry—Prohibition—Indictment.*—Proceedings against the corporation of a city on a charge of neglecting to repair and keep in repair one of its public streets, thereby committing a common nuisance, should be by indictment.

Prohibition granted to restrain a preliminary investigation of such a charge before a police magistrate, and an order nisi to set aside the order granting prohibition refused by a Divisional Court. *Regina v. City of London*, 326.

See ASSESSMENT AND TAXES—CONSTITUTIONAL LAW, 1 — INTOXICATING LIQUORS—STATUTES.

## NEGLIGENCE.

*Contributory Negligence—Nonsuit—Undisputed Facts—Inference.*—In actions for negligence the power of the Judge to nonsuit on the ground of contributory negligence is restricted to cases where it is plain and indisputable that the injury of which the plaintiff complains would not have occurred but for his own want of proper care. Where the facts, or the proper

inference from the facts, are in dispute, the case must go to the jury.

And where the defendants negligently left a hole in the floor of a room unguarded, and the plaintiff, going into the room, saw the danger and at first avoided it, but, on turning to go out again, lost sight of it, stepped into the hole, and was injured:—

*Held*, these facts being undisputed, that it was properly left to the jury to say whether she was negligent or not. *Scriver v. Lowe*, 290.

*See* CARRIERS—MASTER AND SERVANT, 1, 3.

### NEW TRIAL.

*See* DEFAMATION, 1 — JUDGMENT, 2—TRIAL.

### NONSUIT.

*See* DEFAMATION, 2 — NEGLIGENCE.

### NOTICE OF ACCIDENT.

*See* MUNICIPAL CORPORATIONS, 3.

### NUISANCE.

*See* MUNICIPAL CORPORATIONS, 5.

### ONUS.

*See* BANKRUPTCY AND INSOLVENCY, 3—DEFAMATION, 2—MASTER AND SERVANT, 3.

### PATENT.

*See* CROWN LANDS.

### PAYMENT.

*See* BANKRUPTCY AND INSOLVENCY, 2, 3.

### PAYMENT INTO COURT.

*See* SALE OF GOODS.

### PREFERENCE.

*See* BANKRUPTCY AND INSOLVENCY, 2, 3.

### PRESUMPTION.

*See* BANKRUPTCY AND INSOLVENCY, 2—COMPANY, 1.

### PRINCIPAL AND AGENT.

*Hotel Manager—Moneys Received by—Liability to Account—Power of Court to Disregard Findings of Jury—Rule 615.]—The plaintiff was the manager*

of the defendants' hotel, and each evening went over the receipts and disbursements and entered a summary thereof in the cash book, taking over the money which constituted the balance on hand, which he subsequently deposited with the defendants' bankers. During the day the money was kept in a safe in the office, to which others had access. When any money was taken out a slip was put in shewing the amount so taken and the purpose. The plaintiff, while admitting the accuracy of the balance up to a specified date, claimed that he was not responsible thereafter, by reason of his not being then able, through overwork, to actually count the money taken over by him:—

*Held*, affirming a judgment of a County Court Judge setting aside a verdict of a jury in favour of the plaintiff and ordering judgment to be entered for the defendants, that, under the circumstances, and in the absence of a positive statement shewing the inaccuracy of the balance which the cash book shewed to be on hand, the plaintiff was bound to account therefor.

The power conferred on the Court by Rule 615 to give judgment on the evidence before it, may be exercised though the result be to disregard the finding of a jury, but it must be used with great caution. *Clayton v. Patterson*, 435.

*See* HUSBAND AND WIFE.

## PRINCIPAL AND SURETY.

*Guaranty—Duration of.*—The defendant gave to the plaintiff a guaranty that in consideration of his indorsement for one F. of certain promissory notes for a large sum given by him for the purchase of a bankrupt stock, the defendant would guarantee the due payment of the amount of such notes at maturity, provided he was not called upon to pay in all more than \$2000:—

*Held*, that the effect of the guaranty was that it continued in force, to the full extent of \$2000, until the last of the notes was paid, and that the defendant could not before such event relieve himself from liability by transmitting to the plaintiff \$2000 which he had received from F., being the proceeds of a portion of the stock. *Struthers v. Henry*, 365.

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## PRIVILEGE.

*See* DEFAMATION, 1, 3.

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## PROCEDURE.

*See* LIEN, 2.

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## PROHIBITION.

*See* DIVISION COURTS, 1—  
MUNICIPAL CORPORATIONS, 5.

## RAILWAYS AND RAILWAY COMPANIES.

1. *Farm Crossing*—“*Farm Purposes*”—*Injury to Stranger*—*Duty*.]—The defendants having, in compliance with the requirements of sec. 191 of the Railway Act of Canada, 51 Vict. ch. 29, made, and assumed the duty of keeping in repair, a crossing over their railway where it crossed a certain farm, nevertheless allowed it to get into an unsafe and defective condition whereby a horse of the plaintiff was injured. The plaintiff was at the time using the horse, with the permission of the owner of the farm, in hauling gravel from a part of the farm to the highway, for which purpose it was necessary to cross the railway:—

*Held*, without deciding whether the right of user of such a crossing is limited to a user for farm purposes, but assuming it to be so limited, that the hauling of gravel was, under the circumstances, a farm purpose, and that the defendants owed a duty, even apart from sec. 289, towards one using the crossing by invitation of the owner. *Plester v. Grand Trunk R.W. Co.*, 55.

2. *Bond of Provisional Directors*—*Bonus*—*Conditions*—*Liability to perform, after Amalgamation with other Companies*.]—By the bond of a railway company, executed by its provisional directors, in con-

sideration of a bonus in aid of the railway, the company agreed to erect and maintain workshops in a certain town during the operation of the railway.

The company, after certain changes of name, amalgamated with other companies and formed a larger one under another name, which latter company, although it had agreed to do so, ceased to so maintain the workshops.

This last mentioned company subsequently amalgamated with and became part of the defendants' system, and by the amalgamation the defendants became responsible for all liabilities of the other companies:—

*Held*, that the bond of the provisional directors was a corporate act binding on its successors, and, by consequence, on the defendants, who had acquired the road; that the road, though it formed part of a larger railway connection represented by the defendants, was still in operation, and, as the contract was to maintain the workshops during the operation of the railway, it remained a binding engagement; and a reference to ascertain the damages, if any, for breach of the covenant, was directed. *Town of Whitby v. Grand Trunk R.W. Co.*, 99.

3. *Diverting Stream Under Highway*—*Erection of Substantial Bridge*—*Liability to Keep in Repair*.]—A railway company, desiring to cross a

highway at a point where it was carried by a bridge over a small stream, in pursuance of its statutory powers, diverted the stream to a point some distance away, and built a new bridge over it where it there intersected the highway:—

*Held*, that, whatever remedy the municipality might have if it had sustained damage by reason of the exercise by the railway company of its rights, the latter was under no liability, in the absence of special agreement, to keep the bridge substituted by it in repair. *Town of Peterborough v. Grand Trunk R. W. Co.*, 154.

[Affirmed by the Court of Appeal, 1 O.L.R. 144.]

See CARRIERS—CONSTITUTIONAL LAW, 1—DEED.

## REFERENCE.

See SOLICITOR, 2.

## RENEWAL OF LEASE.

See LANDLORD AND TENANT, 1.

## RESTRAINT OF TRADE.

See TRADE UNION.

## REVENUE.

*Succession Duty Act—Deduction of Debts—Compromise of Claim by Executors.*—For the

purpose of arriving at the aggregate value of the property of a deceased person under sec. 3, subsec. 3, of the Succession Duty Act, R.S.O. 1897 ch. 24, debts are to be deducted. The duty to be paid by the person who takes is on the value of the estate which he takes, at the time of taking.

Sums *bond fide* paid by executors for the purpose of settling claims against them as such, must be considered debts for the purpose of administration and of ascertaining the amount of succession duty.

Where executors, erroneously and in ignorance of the existence of claims, overvalued the estate and paid succession duty for which the estate would not have been liable had the amount of such claims been deducted therefrom, they were held entitled to recover back from the Crown the amount of the duty wrongly paid. *Ross v. The Queen*, 143.

## ROAD COMPANY.

See CONTRACT.

## RULES OF COURT.

Rule 498—See JUDGMENT, 2.

615—See PRINCIPAL AND AGENT.

616—See COMPANY, 4.

938—See WILL, 3.

938 (f)—See TRUSTS AND TRUSTEES.

Rule 946—*See* ADMINISTRATION.

954—*See* ADMINISTRATION.

### SALE OF GOODS.

*Non-acceptance—Contract—Tender—Waiver—Damages—Price of Goods—Property not Passing—Possession—Judgment—Payment into Court.*]

On the 30th May, 1899, the plaintiff and defendant agreed in writing for the sale by the former to the latter of certain goods for \$175, payable \$30 on receipt of bill of lading for or tender of the goods, and the balance to be paid in instalments, for which promissory notes were to be given; the property to remain in the plaintiff until payment of the notes, but the goods to be shipped as soon as possible, freight and charges to be paid by the defendant. On the 6th June the plaintiff sent the defendant an invoice of the goods, and on the 14th of that month the defendant wrote to the plaintiff refusing to proceed with the contract upon the ground that the invoice price was not that agreed upon. On the 15th June the plaintiff advised the defendant that the goods had been shipped and drafts and notes forwarded. Some correspondence ensued, but the defendant adhered to his refusal to take the goods. The goods arrived at the town where the defendant lived on the 10th July, and the defendant on the 20th

July again wrote to the plaintiff that he had supposed that the plaintiff had concluded not to ship the goods, and again refused to take them, giving as a ground that the season for use of them had passed, and saying that they were now at the station at the plaintiff's risk:—

*Held*, that the defendant having refused to perform his contract on the 15th June, at which date he did not contend that there had been default on the plaintiff's part, and his refusal remaining unretracted down to the time of the arrival of the goods in July, his right to require tender at the date fixed for the performance was waived.

*Held*, also, that the plaintiff was entitled to recover the full price of the goods as damages for breach of the contract, upon the ground that the right to the possession of the goods having been transferred by the plaintiff to the defendant, the plaintiff had done all that he was required by the contract to do to entitle himself to payment of the price. The stipulation by which the property in the goods was to remain in the plaintiff during the term of credit, notwithstanding the delivery of possession to the defendant, and the fact that the plaintiff had given up possession to the defendant, as far as he could, took the case out of the general rule which prevents a vendor from recovering the price where he has not

parted with the property in the goods.

*Held*, further, that the defendant should be allowed to pay the amount of the judgment and costs against him into Court, to be paid out to the plaintiff upon his shewing that the defendant could still obtain possession of the goods. *Tufts v. Poness*, 51.

See HUSBAND AND WIFE.

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### SALE OF LAND.

See TRUSTS AND TRUSTEES.

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### SEAL.

See CONTRACT.

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### SEPARATION DEED.

See ELECTION.

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### SET-OFF.

*Bank Deposit — Depositor's Promissory Note—Ranking on Insolvent Estate of Deceased Maker.*]—A testator, having a deposit to his credit in a bank at the time of his death, was indebted to the bank on a note under discount, which had not then matured. The deposit remained with the bank until after the maturity of the note, when the bank brought an action on it against the executors of his insolvent estate, who claimed that the bank should

rank on the estate for the full amount of the note and give credit upon the dividend for the amount of the deposit:—

*Held*, that the deposit not having been withdrawn or demanded before the maturity of the note, the bank was entitled to set off the debt on the note against the deposit, and to rank for the balance. *Ontario Bank v. Routhier*, 67.

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### SLANDER.

See DEFAMATION, 1.

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### SOLICITOR.

1. *Annual Certificate—Practising without—Solicitors Act.*]—A solicitor who has not taken out his annual certificate cannot, without rendering himself liable to suspension, etc., under the provisions of secs. 22, 23, and 24 of the Act respecting solicitors, R.S.O. 1897 ch. 174, practise as such, even in an isolated instance, and he is not relieved by the fact that he is interested in the subject-matter of the litigation. *Re Clarke*, 237.

2. *Bill of Costs—Action on—"In a Summary Way"—Reference—Right of Appeal.*]—An action on a solicitor's bill was stayed upon agreement providing for evidence to be given to an accountant named, and "in case of dispute, the matters disputed are to be referred in a

summary way to ——— under R.S.O. ch. 174 for decision:”—

*Held*, that by “a summary way” the parties meant that the reference was to be without ceremony or delay, the words “under R.S.O. ch. 174” merely introducing the procedure under that Act (the Act respecting Solicitors), and not to be construed as providing for an appeal. *Sale v. Lake Erie and Detroit R. W. Co.*, 159.

### STATUTES.

*Survey—Highway—Encroachment—“Porch or Projection Attached to Any Dwelling”—Verandah—Lowering Grade—Compensation—Municipal Act.*—When an Act of Parliament begins with words which describe things of an inferior degree and concludes with general words, the latter shall not be extended to anything of a higher degree.

A statute confirming a survey of a town provided that houses built before a named date need not be removed though encroaching upon streets as ascertained by such survey, but that this “shall not apply to any fence, steps, platform, sign, porch, or projection attached to any such dwelling house.”—

*Held*, that a verandah of wood, resting on stone pillars, having its own roof, and firmly attached to such a house, was an integral part of the house, and

not a porch or projection attached to it, and need not be removed under the Act.

*Held*, also, that the position of the house and verandah did not debar the owner from applying for compensation under the Municipal Act for damage sustained, within sec. 448 of that Act, by lowering the grade of the street in front. *Williams v. Town of Cornwall*, 255.

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### SUBROGATION.

*See BILLS OF SALE AND CHATTEL  
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### SUCCESSION DUTY.

*See REVENUE.*

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### SUMMARY JUDGMENT.

*See COMPANY, 4.*

**SUMMARY REFERENCE.**

See SOLICITOR, 2.

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**SUMMARY TRIAL.**

See CRIMINAL LAW, 1, 2.

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**SURVEY.**

See STATUTES.

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**SURVIVORSHIP.**

See ADMINISTRATION.

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**TAX SALE.**

See ASSESSMENT AND TAXES, 2.

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**TENANT FOR LIFE.**

*Renewal of Lease—Carrying on Business on Premises—Profits—Account.*]—A widow was entitled under her husband's will to the use and enjoyment of all his property during her life. It was conceded that she was entitled to the enjoyment in specie of the personal estate. The testator owned a brick-field on leasehold land, which was a going concern at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it. She put other assets of the estate

into this business and extended it, and when she died it was still a going concern. At the expiration of the term of her husband's lease, she obtained a new one, covering a larger area of land:—

*Held*, that the widow, having elected to carry on the business on these premises, did so for the ultimate benefit of the estate. She was entitled to all the income, earnings, and profits derivable therefrom each year, in so far as she applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plant, stock, and belongings of the business remained on the premises or elsewhere at her death, became the property of the husband's estate.

An account against her executor was directed, and the scope of the inquiry defined. *Wakefield v. Wakefield*, 36.

[Affirmed by the Court of Appeal, 22nd April, 1901.]

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**TENDER.**

See MORTGAGE, 2—SALE OF GOODS.

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**THEFT.**

See CRIMINAL LAW, 1.

**TRADE-NAME.**

*Sale of Business—Right to Use for Limited Period—Right to Use After Expiry.*]—The proprietor of a firm name, not being merely his own name, who has sold the business with which it was connected, and with it the right to use the firm name for a limited period, cannot, after the expiry of the time, prevent the user of such name when he himself does not carry on or intend to carry on business under it. *Love v. Latimer*, 231.

**TRADE UNION.**

*Expulsion of Member—Articles of Association—By-Law in Restraint of Trade—Illegality—Militia Act.*]—The plaintiff, a musician and a member of the Active Militia of Canada and of the band of a militia regiment, became a member of the defendant association, a body incorporated under the Friendly Societies and Insurance Corporations Act, whose object was "to unite the instrumental portion of the musical profession for the better protection of its interests in general and the establishment of a minimum rate of prices to be charged by members of the said association for their professional services, and the enforcement of good faith and fair dealing between its members, and to assist members in sickness and death."

After the plaintiff had become a member, the defendants adopted and added as part of one of their articles of association the following: "No member of this association shall play on any engagement with any person who is playing an instrument, unless such person can shew the card of this association in good standing. This by-law shall not apply to oratorio or symphony concerts, bands doing military duty, or amateurs. . . ." After the passing of this by-law, the plaintiff and the other members of the regimental band to which he belonged played at a concert, in uniform, under the direction of the bandmaster, and with the permission of the commandant and officers of the regiment. For so playing (some of the band not being members of the association) a fine was imposed on the plaintiff by the executive committee of the defendants, and, in consequence of its not being paid within the time prescribed, he was expelled from membership:—

*Held*, that, at the time the plaintiff joined the association, it was a legal society, its objects being of a friendly and provident nature; but the amendment was unreasonable and in restraint of trade, and for that reason, and also because contrary to the Queen's Army Regulations and the Militia Act of Canada, was illegal, and the plaintiff's expulsion was invalid,

and he was entitled to an injunction and damages.

*Rigby v. Connol* (1880), 14 Ch.D. 482, *Mineral Water Bottle, etc., Society v. Booth* (1887), 36 Ch.D. 465, *Swaine v. Wilson* (1889), 24 Q.B.D. 252, and *Chamberlain's Wharf, Limited v. Smith*, [1900] 2 Ch. 605, considered. *Parker v. Toronto Musical Protective Association*, 305.

### TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS, 1.

### TRIAL.

*Jury — Incompetency of Jurors—New Trial.*—A new trial was ordered, upon payment of costs, where it was shewn that one of the jurors was not selected to be of the panel, that another was so deaf that he was not able to hear some of the most important evidence, and that a third was in such friendly relations with the defendants, an incorporated company, as should have induced him to decline to sit on the trial. *Cameron v. Ottawa Electric R. W. Co.*, 24.

See CRIMINAL LAW—DEFAMATION, 2—DIVISION COURTS, 1—LIEN, 2.

### TRUSTS AND TRUSTEES.

*Sale of Land—Approval of Court.*—Trustees having un-

successfully offered for sale estate property consisting of a block, consisting of hotel and stores and a dock together, and subsequently the hotel and stores together, received an offer for the hotel by itself:—

*Held*, on an application to the Court to approve and confirm the sale under R.S.O. 1897 ch. 129, sec. 39, and Con. Rule 938, subsec. (f), that the Court had jurisdiction to express its approval, and under the circumstances it was a case in which the jurisdiction ought to be exercised.—*Nelson v. Bell*, 118.

### WAGES.

See COMPANY, 4.

### WAIVER.

See DIVISION COURTS, 1—MUNICIPAL CORPORATIONS, 3—SALE OF GOODS.

### WAY.

See CONSTITUTIONAL LAW, 1—CONTRACT—MUNICIPAL CORPORATIONS, 3, 5—RAILWAYS AND RAILWAY COMPANIES, 3—STATUTES.

### WILL.

1. *Devise of Residue—Executive Devise—Event Happening in Part.*—A testator by his

will gave his wife a life interest in his estate, and at her death after giving some specific legacies the will provided: "The residue

. . . I give, devise, and bequeath as follows, that is to say: it shall be equally divided between my . . . brothers;" (two) "or in case of their dying before my . . . wife it shall be equally divided between the heirs of my . . . brothers."

One of the brothers died in the lifetime of the widow and the other survived her:—

*Held*, that, as the event provided for, viz., the death of both brothers during the widow's lifetime, had not happened, the devise of the residue to them was not divested, and that the share of the brother first deceased passed under his will. *Re Metcalfe, Metcalfe v. Metcalfe*, 103.

2. *Bequest of Personalty to Legatees, "or their Heirs, Executors, or Assigns" — Death of Legatee in Lifetime of Testator — "Heirs," Meaning of—Next-of-kin.*]—A testator, by his will, after a provision in favour of his wife for life, directed that "at the death of my beloved wife . . . any money that may then be remaining . . . shall be equally divided and paid to" certain nephews and nieces, naming them, "or their heirs, executors, or assigns." One of the nieces predeceased the testator, leaving a husband and children:—

*Held*, that the gift to the deceased niece did not lapse, and that her heirs entitled to her share were those persons who would have taken her personal property under the Statute of Distributions in case of her dying intestate possessed of personal property. *Re Wrigley Estate*, 108.

3. *Charitable Use—Bequest to Poor House—Mortmain—Postponement of Realization—Costs.*]—A testator directed his farm to be sold at the expiration of four years and the proceeds paid over to the treasurer of the Bruce County Poor House to be expended in luxuries for the inmates. It appeared that the House of Refuge of the County was generally known as the County Poor House:—

*Held*, that the bequest was a good charitable use within R.S.O. 1897 ch. 112.

*Held*, also, that the provision postponing the sale for more than two years, contrary to sec. 4 of said Act, was invalid, unless the period were extended by the Court or Judge.

As there were no disputed facts and no questions that could not have been raised under Rule 938, costs only of a motion under that rule were allowed. *In re Brown, Brown v. Brown*, 323.

4. *Husband and Wife — Dower—Election—Ignorantia Juris.*]—A testator left his wife all his personal estate absolutely,

and all his real estate for life or widowhood, subject to which he devised "my said real estate" in specific parcels to his sons, and died in 1889. After his death his widow, who knew the will, remained in possession of the house, to which she built an addition, and sold some of the timber, rented the land on shares for two seasons, supporting the children, and married again in 1891. In 1893 she and her husband took a lease of the property from the executors to expire in 1899, when the eldest son came of age. His parcel was conveyed to him by the executors, who then granted a new lease, still current, of the rest of the land to the second husband:—

*Held*, that the widow was put by the will to her election:—

*Held*, also, that, though there was no positive evidence that the widow knew she had a right to elect between the will and her dower, yet on the principle *ignorantia juris neminem excusat* she must be held to have elected in favour of the will. *Reynolds v. Palmer*, 431.

See DEVOLUTION OF ESTATES  
ACT—ELECTION—INSURANCE, 1.

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### WINDING-UP.

See COMPANY, 1, 3.

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### WITNESS.

See EVIDENCE, 2.

### WORDS.

"*Blackmailing.*"]—See DEFA-  
MATION, 2.

"*Factory.*"]—See MASTER AND  
SERVANT, 3.

"*Farm purposes.*"] — See  
RAILWAYS AND RAILWAY COM-  
PANIES, 1.

"*Farmers' sons not actual  
owners.*"]—See MUNICIPAL COR-  
PORATIONS, 4.

"*Heirs.*"]—See WILL, 2.

"*Immediately.*"]—See INSUR-  
ANCE, 5.

"*In a summary way.*"]—See  
SOLICITOR, 2.

"*Labourers, servants, and  
apprentices.*"]—See COMPANY, 4.

"*May be set aside.*"]—See  
COMPANY, 1.

"*Notice in writing.*"]—See  
LIEN, 1.

"*Occupation or exposure.*"]—  
See INSURANCE, 4.

"*Porch or projection.*"]—See  
STATUTES.

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### WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT, 3.

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### WRIT OF SUMMONS.

See JUDGMENT, 2.







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